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APPENDIX

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Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1557

ALVIS G. SPEIGHT, t/a HAREM BOOK STORE, and JAMES L. CHANDLER,
Appellants,

v.

LEWIS R. SLATON, In his capacity as District Attorney, Atlanta Judicial Circuit, and
HINSON McAULIFFE, In his capacity as Solicitor, Criminal Court of Fulton County,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

FILED MAY 21, 1973
PROBABLE JURISDICTION NOTED
OCTOBER 15, 1973

Supreme Court of the United States

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DOCKET ENTRIES

August 28 – Complaint for preliminary injunction, permanent injunction, declaratory judgment, and THREE-JUDGE COURT, with Exhs. A and 1-4, filed. Summons issued and delivered to U. S. Marshal. Copies of complaint to Marshal for service on Gov. Carter & Atty. Gen. Bolton. To CAM.

September 5 – Marshal's returns on service executed as to Slaton & McAuliffe on 8/29/72, and as to Gov. Carter & Atty. Gen. Bolton on 8/30/72, filed.

September 11 – ORDER from Chief Judge Brown 5th Circuit designating District Judges Moye & O'Kelley & Circuit Judge Morgan to compose a Three Judge Court, filed. Copy to counsel.

September 13 – ANSWER of defts., filed. (includes request for abstension) (Copy at judge) Memorandum of Law in support of resp's requestion of abstension, filed. (1 Copy at judge)

September 17 – Hearing set before 3-judge panel for 12-21-72 at 10:30 a.m.; briefs requested by 12-7-72. Copy of notice to ea. judge, counsel, and Gov. and Atty. Gen. via certified mail RRR.

September 27 – Submitted on Deft's Request for Abstension.

October 5 – ORDER filed deferring consideration of deft's request for abstension until the time of the hearing. Copy to counsel and to ea. Judge.

November 28 – Deft's proposed stipulations of fact and conclusions of law, filed. (Copy to each Judge)

December 7 – Pltfs' brief in opposition to defts' request for abstension, filed. Copy to ea. Judge.

December 7 – Pltfs' proposed stipulations of fact and conclusions of law, filed. Copy to ea. Judge.

December 20 – Petrs' brief in support of their contention that the closing of a bookstore under the guise of abating a public nuisance is a prior restraint which violates the 1st, 5th, & 14th Amendments, filed. Copy to ea. Judge.

December 21 – HEARING before three-judge panel. Counsel were heard. Copy of Respondents' Brief in Supreme Court of U. S. No. 71-1051, filed. Mr. Fieldman to file copies for each judge. The Court took the matter under advisement. Copy of respondents' brief to ea. Judge (12/27/72) Steno-type notes of proceedings had 12/21/72, filed.

December 29 – Pltf's ltr. with items attached (1) ltr. to each judge; (2) Copy of complaint, etc. in C.A. No. 725131 – U.S.D.C. – ND of Ind. (3) Copy of decision of Indiana Ct. of Appeals; & (4) copy of Cert. for designation and order designating a 3 Judge Ct. – U.S.D.C. – S.C. – C.A. No. 72-769, filed. (Atty. advised in ltr. copy furn. to each judge).

January 22 – Pltf's ltr. with ltr. to each judge & copy of decision of three-judge ct. in District of New Jersey – C.A. No. 911-72, filed. (Atty. advised in ltr. copy furn. to each judge).

February 22 – 2 Judge Opinion & Order filed & entered with Circuit Judge Morgan dissenting – dismissing complaint, filed. (Copy to Counsel 2-27-73) & (Copy to each Judge).

February 26 – Pltfs' NOTICE OF APPEAL TO USSC, filed. Copy of notice to USSC w/ docket sheet & defts' counsel.

October 15 – Certified Copy of Order of U.S.S.C. noting probable jurisdiction, filed. (Copy to counsel, 10/15)

November 16 – Request from USSC to have file transmitted to their office, rec'd.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALVIS G. SPEIGHT t/a
HAREM BOOK STORE and
JAMES L. CHANDLER,
Plaintiffs,

v.

LEWIS R. SLATON,
In His Capacity as
District Attorney, Atlanta
Judicial Circuit; and

Civil Action File No. 17075

HINSON McAULIFFE,
In His Capacity as
Solicitor General, Criminal
Court of Fulton County,
State of Georgia,
Defendants,
Jointly and Severally.

Also Serve in Their Statutory
Capacity Only, Under
28 U.S.C. § *2284(2),* and Not
As Defendants, His Excellency
JIMMY CARTER, Governor of the
State of Georgia, State
Capitol, Room 203, Atlanta,
Georgia; and The Honorable

ARTHUR K. BOLTON, Attorney
General of the State of
Georgia, Judicial Building,
Room 132, Atlanta, Georgia.

COMPLAINT FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, DECLARATORY JUDGMENT, AND CONVOCATION OF THREE-JUDGE COURT
Filed August 28, 1972

TO THE HONORABLE, THE JUDGES OF SAID COURT:

Plaintiffs, by and through their attorneys at law, D. FREEMAN HUTTON, Esquire, ROBERT EUGENE SMITH, Esquire, and GILBERT H. DEITCH, complaining of Defendants herein jointly and severally, respectfully allege as follows:

I.

JURISDICTION

1.

This is a civil action whereby Plaintiffs, as their interests may appear, pray a preliminary and permanent injunction issue to restrain Defendants, and each of them, from attempting or continuing to attempt, to close Harem Book Store under the guise of abating a continuing public nuisance, purportedly under authority of enforcement of *Title 72, Georgia Code of 1933,* as amended, and the provisions thereof. Plaintiffs, as their interests may appear, pray, as well, for a declaratory judgment to determine the constitutionality of Georgia's Statutory Scheme in regard to "Nuisances" (*Title 72, Georgia Code of 1933,* as amended), as written and/or applied, insofar as they purport to relate to a business activity offering presumptively protected publications to the interested adult public under the penumbra of the *First Amendment,* or

as threatened to be applied herein. Insomuch as the within Complaint seeks injunctive relief against the use of a state statute by law enforcement officials, said Plaintiffs, as their interest may appear, pray that a statutory Three-Judge Court be designated to consider the questions preserved herein (*28 U.S.C. § 2281*).

2.

This is also a civil action whereby Plaintiffs, as their interests may appear, pray a preliminary and permanent injunction issue to restrain Defendants, and each of them, as well as their agents, servants, employees and/or attorneys and others under their direction and control, from acting under color of enforcement of *Georgia Code § 26-2103* (Ga. L. 1971, § 2, pp. 344-345) which declares that the use of premises in violation of the Code Chapter relating to distribution of obscene materials shall, in and of itself, constitute a public nuisance and authorize a closing thereof and to further restrain Defendants, and each of them, as well as their agents, servants, employees and/or attorneys and others under their direction and control, from acting under *Georgia Code §§ 72-701 and 72-702*, to effect a constitutionally prohibited prior restraint under the guise of abating a so-called continuing public nuisance. Plaintiffs, as their interests may appear, pray, as well, a declaratory judgment to determine the constitutionality of said *Georgia Code § 26-2103* (Ga. L. 1971, § 2, pp. 344-345), as written and/or as applied, and as threatened to be applied herein. Plaintiffs, as their interests may appear, pray that the Court issue a declaratory judgment on the constitutionality of said *Georgia Code § 26-2103* (Ga. L. 1971, § 2, pp. 344-345).

3.

This is also a civil action whereby Plaintiffs, as their interests may appear, pray a preliminary and permanent injunction issue to restrain Defendants, and each of them,

from acting under *Georgia Code* § *26-2104* (Ga. L. 1971, § 3, pp. 344-345) which authorizes that any press materials declared to be obscene by the provisions of *Chapter 26-21* of the *Georgia Code* as well as advertisements for any such press materials (although themselves not obscene in the constitutional sense) are under said law determined to be contraband, and subject to forfeiture and destruction. Plaintiffs, as their interests may appear, pray, as well, for a declaratory judgment as to the constitutionality of said *Georgia Code* § *26-2104* (Ga. L. 1971, § 3, pp. 344-345), as written and/or as applied, and as threatened to be applied herein.

4.

This is also an action whereby Plaintiffs, as their interests may appear, pray a preliminary and permanent injunction issue to restrain Defendants, and each of them, from utilizing *Georgia Code* § *26-2101* (Ga. L. 1968, pp. 1249, 1302; Ga. L. 1971, p. 344), to determine the obscenity of the merchandise and inventory of the Harem Book Store declared obscene. Plaintiffs, as their interests may appear, pray, as well, for a declaratory judgment as to the constitutionality of said *Georgia Code* § *26-2101* (Ga. L. 1968, pp. 1249, 1302; Ga. L. 1971, p. 344), as written and/or as applied, and as threatened to be applied herein.

5.

Jurisdiction is conferred on this Court for the resolution of the substantial constitional questions herein presented by 28 U.S.C. § 1343(3), which provides, in pertinent part, that the District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> "To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage of any right, privilege or immunity secured by the *Constitution of the United States* . . . ",

and the organic law which authorizes the institution of this suit founded on *42 U.S.C. § 1983*, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory subjects or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the *Constitution* and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Suit is further founded on *28 U.S.C. § 1343(4)* "to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights . . . ", as well as *Article III, Section 2* of the *Constitution of the United States.*

Prayer for Injunctive Relief is founded on *Rule 65* of the *Federal Rules of Civil Procedure.*

Prayer for Declaratory Relief is founded on *Rule 57* of the *Federal Rules of Civil Procedure*, as well as *28 U.S.C. § 2201.*

Jurisdiction for convocation of a Three-Judge Court is founded on *28 U.S.C. §§ 2281 and 2284.*

The jurisdiction of this Court is also invoked under *28 U.S.C. § 1331*, this being a civil action wherein the matter in controversy exceeds, exclusive of interest and costs, the sum and value of Ten Thousand ($10,000.00) Dollars, and applies under the *Constitution* and the laws of the United States.

II.

PARTIES

6.

Plaintiff, Alvis G. Speight, trading as the Harem Book Store, located at 2979 Campbellton Road, S.W., Atlanta, Georgia, is engaged, through his agents, servants, and employees, in the sale and offering for sale of books, magazines, newspapers, movie films, pictures, and other press materials which are presumptively protected under the *First Amendment* to the *Constitution of the United States*, pursuant to applicable City of Atlanta business licenses.

The press materials offered for sale by the Harem Book Store are comparable to those declared not to be obscene by the Supreme Court of the United States, and many other inferior Federal Courts, as well as various state appellate courts and, hence, are protected expression under the *First Amendment* to the *Constitution of the United States*, as made applicable to the States under the *Fourteenth Amendment*.

No sales or offerings are made by the Harem Book Store to persons under eighteen years of age (minors) of any of the sexually-oriented press materials distributed or offered for distribution by the Harem Book Store, nor are they "pandered" in the *Ginzburg*-sense (*Ginzburg v. U.S.A.*, 383 U.S. 463 [1966]), nor are the press materials sold or offered for sale in a way that intrudes impermissibly into the privacy of an unwilling adult who wishes to avoid confrontation therewith.

Prior to July 1, 1972, when the legal age of majority in the State of Georgia was lowered to eighteen (18) years of age from twenty-one (21) years of age, the agents, servants and employees of the Harem Book Store made no sales or offerings to persons under the age of twenty-one (21).

7.

James L. Chandler, Plaintiff herein, is a Lessee of the premises at 2979 Campbellton Road, S.W., Atlanta, Georgia, where the Harem Book Store is located. Plaintiff Chandler is nominally obligated as Lessee of the said premises for the rent due thereon and is included herein to protect his interests in the premises as they may appear.

8.

Defendant Lewis R. Slaton is named as a defendant solely in his capacity as District Attorney for the Atlanta Judicial Circuit, and as the official authorized by Georgia law to abate a public nuisance, under color of enforcement of the statutes of the State of Georgia.

9.

Defendant Hinson McAuliffe is named as a defendant solely in his capacity as Solicitor General for the Criminal Court of Fulton County, and as an official purporting to be authorized by Georgia statute to abate a public nuisance.

10.

The named Defendants, in their official capacities only, as aforesaid, are joined herein to make enforceable and binding upon them and/or their agents, servants, employees or attorneys, and others under their direction and control, the preliminary and/or permanent injunction, declaratory judgment and/or other relief that may be granted by this Court.

III.

FACTUAL ALLEGATIONS

11.

At all times relevant hereto, Defendants and/or their agents, servants or employees, and others acting under their direction and control, and each of them, separately and in concert, under color and pretense of law, to-wit: under color of enforcement of state statutes, custom and usage of the said statutes referred to hereinabove, have deprived, are continuing to deprive, and threaten further to deprive Plaintiffs, as their interests may appear, their agents, servants, and employees, of rights, privileges and immunities guaranteed to them by the *First, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States,* as well as depriving interested adult citizens of the State of Georgia, and visitors thereto, of access to nonobscene press materials protected by the *First* and *Fourteenth Amendments* to the *Constitution of the United States,* which press materials are offered for sale or sold under nonobtrusive circumstances to interested adults only.

12.

The use of the premises at 2979 Campbellton Road, S.W., Atlanta, Georgia, as a bookstore is consistent with the approved usages for properly zoned, as it is, in the "C-2" classification.

13.

At all times material hereunto, the Harem Book Store has been conducted without any overt breaches of the peace or other interference with the rights of others passing by said premises.

14.

On four occasions since the Harem Book Store opened more than one year ago, agents of the Defendant McAuliffe have purchased a total of thirteen (13) magazines which Defendants contend are obscene. None of said magazines has ever been declared to be obscene in the constitutional sense, and Plaintiffs herein, as their interest may appear, affirm that such press materials are not obscene as a matter of law in the constitutional sense, within the meaning of such term as enunciated by the decisions of the Supreme Court of the United States.

15.

No person, employee or otherwise, has ever been convicted of the commission of a statutory offense at the premises occupied by the Harem Book Store, including the offense of distributing so-called obscene materials in violation of *Georgia Code § 26-2101.*

16.

Despite the facts as alleged herein, and in reckless disregard of decisional law enunciated by the United States Supreme Court dealing with press materials and the *First Amendment,* Defendants have instituted a civil suit in the Superior Court of Fulton County, Georgia, in bad faith, for the purpose of harassing Plaintiffs, as their interests may appear, and effecting irreparable harm, demanding, *inter alia,*

(a) "... injunctions, both temporary and permanent, against the conduct and operation of the Harem Book Store, in and on the premises at No. 2979 Campbellton Road, S.W., in the City of Atlanta, Fulton County, Georgia, by any person;" and,

(b) "... an order declaring all merchandise on said premises as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed;" and

(c) "that a Rule Nisi be issued instanter requiring the defendants named herein (plaintiffs in this action) to show cause why the prayers of this complaint should not be granted."

The suit docketed as Civil Action File No. B-77630 is styled:

"LEWIS R. SLATON AS DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT, AND HINSON MCAULIFFE, AS SOLICITOR GENERAL, CRIMINAL COURT OF FULTON COUNTY, GEORGIA

vs.

CERTAIN PREMISES AT NO. 2979 CAMPBELLTON ROAD, S.W., ATLANTA FULTON COUNTY, GEORGIA; THE BUSINESS CONDUCTED THEREON, KNOWN AS THE HAREM BOOK STORE; THE OBSCENE MATERIALS IN AND ON SAID PREMISES; JAMES L. CHANDLER, LESSEE OF SAID PREMISES; AND ALL OTHER PERSONS ASSISTING AND ABETTING IN THE OPERATION OF THE HAREM BOOK STORE".

A copy of the said Complaint seeking to close the Harem Book Store and prohibit all future distribution of press materials purportedly as a public nuisance and which further seeks forfeiture and destruction of all press materials contained therein is attached hereto as Exhibit "A" and made a part of this Complaint, being incorporated herein by reference.

17.

Under the said Complaint, Plaintiffs, as their interests may appear, have been ordered by the Honorable Claude D. Shaw, Judge, Atlanta Judicial Circuit, Fulton Superior Court, to show cause before him, "then and there to be heard," why the prayers of the Complaint referred to in paragraph 16 hereof should not be granted, placing the burden of proceeding on those seeking to exercise *First Amendment* rights, which procedure has been declared repugnant to the *First Amendment* to the *Constitution of the United States (Freedman v. Maryland,* 380 U.S. 51 [1965]; *Teitel Film Corporation v. Cusack,* 390 U.S. 139 [1968]; *Carroll v. President and Commissioners of Princess Anne County,* 393 U.S. 175 [1968] and *Blount v. Rizzi, et al,* 400 U.S. 410 [1971]).

18.

Defendants knew or should have known that no violation of Georgia statutes, to-wit: *Georgia Code* §*26-2101,* has been alleged and proved in any court of law against Plaintiffs herein, or any of their agents, servants, and employees, relating to the Harem Book Store located at 2979 Campbellton Road, S.W., Atlanta, Fulton County, Georgia, prior to the institution of the Complaint attached hereto and identified as Exhibit "A".

Further, Plaintiffs affirm that in a criminal prosecution charging Plaintiff James L. Chandler, brought in the Criminal Court of Fulton County, by the agents, servant, and employees of Defendant McAuliffe charging violation of State of Georgia Obscenity law, after a trial of three (3) days, a mistrial was declared by the Honorable Daniel Duke, Judge, because the jury was unable to reach a unanimous verdict. (The jury remained in deadlock at four (4) to (1) in favor of acquittal.)

19.

The resort to utilization of the concept of public nuisance authorized by Georgia Statutes by the Defendants in order to shut down the Harem Book Store and forbid press materials to be sold there as well as seeking the forfeiture and destruction of all the press materials contemporaneously being offered for sale at said store, without regard to whether or not each and every single publication can be said to be obscene in the constitutional sense, and indeed, the said Complaint, as sanctified by verification, states, in part, as follows:

> "Said books, magazines and motion picture films and said imitation penises and phallic objects constitute one stock of merchandise all of which is pandered as being in the nature of hard-core pornography and the major portion or a substantial portion of such stock of merchandise is such hard-core pornography, and plaintiffs say that the entire stock of merchandise is accordingly subject to condemnational and forfeiture." (Exhibit "A", p. 3.)

Further, Defendants also, by their proceedings in enforcement of said Georgia Statutes, attempt to circumvent the safeguards of the criminal process with its requirement of proof beyond a reasonable doubt before a jury and substitute therefore a lesser, civil, burden of proof, to-wit: the preponderance of the evidence standard, and a judge.

Said attempt is, in truth and fact, a bad faith effort to force the cessation of sales of all materials in the said store without regard to whether constitutionally protected. (See paragraph 4 of the Complaint attached as Exhibit "A".)

The Defendants and/or their agents, servants, and employees have thus established a pattern of conduct under

color of enforcement of state law and customs under facially invalid statutes of attempting the ultimate suppression of presumptively protected publications and materials without, to this date, ever having had any judicial determination by adversary proceedings that any of said publications or materials offered for sale or sale are, in fact, obscene in the constitutional sense, and unless restrained, Defendants and/or their agents, servants and employees, will perpetuate a "chilling effect" upon the exercise of Plaintiffs' *First Amendment* rights as well as the right of interested adult citizens of the City of Atlanta and the State of Georgia, and of the other forty-nine states who may visit Georgia and who wish to exercise their *First Amendment* right to buy, review and view nonobscene publications and films. The efforts on the part of Defendants to close Plaintiffs' business, beginning almost from the date on which Plaintiffs lawfully complied with the licensing requirements for bookstores and the zoning ordinance then in effect, and opened the business, the threatened closure under the guise of the "abatement of a public nuisance" constitute attempts at a constitutionally invalid "prior restraint" which is condemned by the *First, Fourth, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States.*

IV.

BASIS IN LAW FOR RELIEF

22.

The aforesaid conduct of Defendants, their agents, servants, employees and attorneys, and others acting under their direction and control, and each of them, in seeking to close the Harem Book Store under the guise of abating a nuisance constitutes an invalid "prior restraint", condemned by the *Constitution of the United States* and threatens to have and has had a "chilling effect"on the exercise of

Plaintiffs' constitutional rights, more particularly, the *First, Fourth* and *Fifth Amendments* thereof, as made obligatory on the states under the *Fourteenth Amendment.* The conduct of Defendants, their agents, servants, and employees, in seeking to close Plaintiffs' business is deprivation of Plaintiffs' rights to due process under the *Fifth Amendment* to the *Constitution,* as well as an all too effective restraint on the exercise of Plaintiffs' right to sell and distribute presumptively protected materials to the interested adult public.

23.

If as a result of the Defendants' actions, the Harem Book Store is shuttered, and the press materials contained therein forfeited and destroyed, then the interested adult public will be deprived of access to publications; other business establishments offering press materials to the interested adult public in and around the City of Atlanta will be forced to engage in "self-censorship" causing "chilling of speech", further threatening to deprive said interested adult citizens of such press materials which they have a constitutional right to read and possess; and further, Plaintiffs herein, as their interests may appear, will be irreparably harmed as a result of the substantial interference with advantageous business relations.

24.

By reason of the conduct of the Defendants, their agents, servants, employees and attorneys, and others under their direction and control, as aforesaid, the civil rights of Plaintiffs under the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *United States Constitution* have been violated to their irreparable harm. Unless enjoined, Defendants, their agents, servants, employees and attorneys, will cause further imminent and irreparable harm to Plaintiffs for which they have no plain, adequate remedy at law, and the conduct of Defendants, their agents, servants, employees

and attorneys, had had and threatens to have a continuing "chilling effect" on the Plaintiffs' exercise of their *First Amendment* freedoms. Immediate and irreparable injury, incalculable loss, and damage will result to Plaintiffs if a Preliminary Injunction is not issued, forbidding Defendants, their agents, servants, employees and attorneys, from continuing in their proposed, wholly illegal conduct as aforesaid, under color of enforcing said state statutes.

25.

The provisions of *Georgia Code* § *26-2101* (Ga. L. 1968, pp. 1249, 1302, Ga. L. 1971, p. 344) are repugnant to the *First, Fourth Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States* in the following respects:

(a) Said statutory provisions are void for vagueness in that the same prohibit the doing of an act in terms so vague, fluid, and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof and, as such, are repugnant to the due process provisions of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States,* and further,

(b) Said statutory provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth standards at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court in *First Amendment* matters; and further,

(c) The said statutory provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptible of sweeping and improper application by Defendants and have a "chilling and inhibiting effect" on the exercise of the Federal and State constitutional rights of citizens of the State of Georgia and of the United States, as

well as those of Plaintiffs, to publish, distribute circulate, sell,, receive, and/or purchase materials presumptively protected by the *First Amendment;* and further,

(d) Such statutory provisions are repugnant to the substantive due process provisions of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States,* because they permit deprivation of liberty and/or property interests for the exercise of *First Amendment* rights by unreasonable, arbitrary, and capricious means by Defendants and/or their agents, servants, employees, and attorneys without a showing of a real and substantial relationship to any State's subordinating interest which is compelling to justify State action limiting the exercise by Petitioner of *First Amendment* freedoms; and further,

(e) Said statutory provisions are impermissibly broad and repugnant to the procedural due process requirements of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* by employing means lacking safeguards which due process demands to assure nonobscene materials sought to be distributed as a business activity, the constitutional protection of the *First Amendment,* to which it is entitled; and further,

(f) Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fourth, Fifth,* and *Fourteenth Amendments* to the *Constitution of the United States,* in that said statutory provisions permit inherent powers of censorship and suppression, constituting a prior restraint of the exercise of Plaintiff's *First Amendment* rights by Defendants.

(g) Said statutory provisions are further void for overbreadth in that they do not limit prosecutions to materials which are sold without notice to the public of their nature or without reasonable protection against exposure of the materials to juveniles.

Georgia Code § *26-2103* (Ga. L. 1971, pp. 344, 345; Section 2 of Act 304, 1971) and *Title 72* of the *Georgia Code of 1933, as amended,* are repugnant to the *First, Fourth, Fifth, Sixth,* and *Fourteenth Amendments* to the *Constitution of the United States* for the following reasons:

(a) Said statutes and their application to Plaintiffs constitute a classical "prior restraint" on materials which are presumptively protected under the *First Amendment* to the *Constitution of the United States,* which has been condemned by the Supreme Court of the United States in an unbroken string of cases beginning with Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931) and continuing through recent terms of that Court with its decisions in *New York Times Company v. United States,* 403 U.S. 713 (1971), and *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971).

(b) *Georgia Code* § *26-2103* denies due process and equal protection of the laws to Plaintiffs in that said statute makes a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of a single, isolated transaction as to only one of possibly thousands of presumptively protected publications and materials without any showing of traditional elements necessary to constitute a continuing public nuisance; all of which is repugnant to the *First, Fifth,* and *Fourteenth Amendment* to the *Constitution of the United States.*

(c) Moreover, *Georgia Code* §*26-2103,* by labelling a place of business a public nuisance on the basis of a single, isolated transaction, creates an invalid presumption of the type condemned by the United States Supreme Court in *Leary v. United States,* 395 U.S. 1532, 23 L. Ed. 2d 57, in that it violates the *Fifth* and *Fourteenth Amendments* of the *Constitution of the United States.*

(d) Moreover, said statutory presumption deprives Plaintiffs of their *Fifth* and *Fourteenth Amendment* rights under the *Constitution of the United States* to have *every* element making up a nuisance to be proven, by competent evidence, in a *First Amendment* context, beyond a reasonable doubt.

27.

Georgia's Nuisance Statute, *Title 72* of the *Georgia Code of 1933, as amended*, as written and/or as applied to Plaintiffs, is repugnant to the *Constitution of the United States* in that:

(a) Said statutory scheme's provisions are void for vagueness in that the same prohibit the doing of an act in terms so vague, fluid, and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof and, as such, are repugnant to the due process provisions of the *Fifth* and *Fourteenth Amendment* to the *Constitution of the United States;* and further,

(b) Said provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute sets forth standards at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court in *First Amendment* matters; and further,

(c) The said provisions are void for vagueness and impermissible overbreadth, in the area of *First Amendment* freedoms, because the said provisions are susceptibel of sweeping and improper application by Defendants and have a "chilling and inhibiting effect" on the exercise of the Federal and State constitutional rights of citizens of the State of Georgia and of the United States, as well as those of

Plaintiffs, to publish, distribute, circulate, sell, receive, and/or purchase printed publications; and further,

(d) Said provisions are repugnant to the substantive due process provisions of the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* because they permit deprivation of liberty and/or property interests for the exercise of *First Amendment* rights by unreasonable, arbitrary, and capricious means by Defendants and/or their agents, servants, employees and attorneys without a showing of a real and substantial relationship to any subordinating interest of the State of Georgia which is compelling to justify action limiting the exercise by Plaintiffs of *First Amendment* freedoms; and further,

(e) Said provisions are vague and impermissibly overbroad and thus repugnant to the *First, Fifth,* and *Fourteenth Amendments* to the *Constitution of the United States* in that said provisions permit inherent powers of censorship and suppression, constituting a prior restraint of the exercise of Plaintiff's *First Amendment* rights by Defendants.

(f) Said provisions, as applied, or as threatened to be applied by Defendants to Plaintiffs are repugnant to the *First* and *Fourteenth Amendments* to the *Constitution of the United States* in that they lack adequate safeguards against undue inhibition of materials which are entitled to the protection of the *First Amendment.*

V.

RELIEF SOUGHT

28.

Plaintiffs are further entitled to and desire that this Court enter a declaratory judgment on final hearing under the provisions of *28 U.S.C. §2201* and *Rule 57, Federal Rules of*

Civil Procedure, declaring *Title 72, Georgia Code of 1933*, as amended; *Georgia Code*, §*26-2101* (Ga. L. 1968, 1249, 1302; Ga. L. 1971, p. 344); *Georgia Code* § *26-2103* (Ga. L. 1971, Section 2, pp. 344, 345), and *Georgia Code* §*26-2104* (Ga. L. 1971, Section 3, pp. 344, 345) as written and/or applied, are unconstitutional for the aforesaid reasons.

29.

Plaintiffs are entitled to and desire that a three-judge court be convened to determine the constitutionality of said statutes pursuant to *28 U.S.C.* §§ *2281 and 2284* and issue a preliminary and permanent injunction restraining and enjoining each of the Defendants, their agents, servants, employees, and attorneys, and any and all other persons acting under their direction and control, and each of them, and persons in active concert with them from proceeding against Plaintiffs in enforcing said statutes against Plaintiffs pursuant to authority granted by them, as contemplated in the said State Court Action referred to hereinbefore.

WHEREFORE, Plaintiffs pray:

1. That a three-judge court be convened to hear and decide the issues raised herein;

2. That a preliminary injunction issue upon hearing restraining Defendants, and/or their agents, servants, employees, and attorneys, pending a hearing and determination of Plaintiffs' application for permanent injunction from proceeding against Plaintiffs in enforcing the said statutes referred to in Paragraph 29 herein or proceeding against Plaintiffs pursuant to authority granted by them, as contemplated in the state court action referred to above.

3. That after final hearing said injunctions be made permanent and said statutes referred to above be declared

unconstitutional as written and/or as applied to the controlled distribution of adult-type publications and materials to persons eighteen (18) years of age or older in a nonobtrusive manner, absent *"Ginzburg"*-type pandering, by Plaintiff Speight herein; and

4. That a prelimianry and permanent injunction issue restraining Defendants, their agents, servants, employees, and attorneys and any and all other persons acting under their direction and control from (a) enforcing or acting under said statutes referred to in Paragraph 28 herein in an unconstitutional manner or to apply them in a manner to obtain unconstitutional results with respect to these Plaintiffs, their agents, servants, and employees.

5. That the Governor and the Attorney General of the State of Georgia be given notice by registered mail of the pendency of the Plaintiffs' application for preliminary injunction, as required by *28 U.S.C. § 2284(2).*

6. That Plaintiffs have such other and further relief as may be appropriate under the circumstances in this case together with costs.

Respectfully submitted,

D. FREEMAN HUTTON, Esquire
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1175 Peachtree Street, N.E.
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(404) 892-8890

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Suite 507
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Towson, Maryland, 21204
(301) 821-6868

Counsel for Plaintiffs.

STATE OF GEORGIA
COUNTY OF FULTON

VERIFICATION

Personally appeared before me, the undersigned attesting officer, ALVIS G. SPEIGHT and JAMES L. CHANDLER, Petitioners herein, and after first being duly sworn, depose and say that the facts alleged in the above and foregoing *Complaint for Preliminary Injunction, Permanent Injunction, Declaratory Judgment, and Convocation of Three-Judge Court* are true and correct, to the best of his current knowledge, information, and belief, respectively.

ALVIS G. SPEIGHT

JAMES L. CHANDLER

SWORN TO AND SUBSCRIBED before me,
this 25th day of August, 1972.

D. FREEMAN HUTTON
Notary Public

(SEAL)

THE SUPERIOR COURT FOR THE COUNTY OF FULTON STATE OF GEORGIA

LEWIS R. SLATON AS DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT, AND HINSON MCAULIFFE, AS SOLICITOR GENERAL, CRIMINAL COURT OF FULTON COUNTY, GEORGIA

vs. CIVIL ACTION

CERTAIN PREMISES AT NO. 2979 CAMPBELLTON ROAD, S.W., ATLANTA, FULTON COUNTY, GEORGIA; THE BUSINESS CONDUCTED THEREON, KNOWN AS THE HAREM BOOK STORE; THE OBSCENE MATERIALS IN AND ON SAID PREMISES; JAMES L. CHANDLER, LESSEE OF SAID PREMISES; AND ALL OTHER PERSONS ASSISTING AND ABETTING IN THE OPERATION OF THE HAREM BOOK STORE

FILE NO. B-77630

COMPLAINT

EXHIBIT "A"

1.

Plaintiffs complain under the provisions of Sections 26-2103 and 26-21-4 of the Criminal Code of Georgia against the premises at No. 2979 Campbellton Road, S.W. in the City of Atlanta, Fulton County, Georgia, and the business conducted thereon known and designated as the Harem Book Store, as a public nuisance, and against the obscene materials in and on said premises as contraband.

2.

Upon information and belief plaintiffs allege that James L. Chandler, who resides at No. 3649 Buford Highway, Apartment C-5, DeKalb County, Georgia, is the lessee of said

premises, and the owner and operator of the aforesaid Harem Book Store.

3.

Said premises and business have been used, are now being used, and, unless prevented by judicial action, will continue to be used for the advertising, storage, sale, and exhibition for sale of materials obscene within the meaning of Section 26-2101 of the Criminal Code of Georgia. Said activities are being conducted by the aforesaid Chandler, and by various agents, servants and employees of the aforesaid Chandler whose names and addresses are not alleged because of the rapid rate of change or turnover in such personnel.

4.

Said materials consist of books, magazines, and motion picture films, each and all of which contain photographs, still or moving, of one or more of the following:

a) Acts of sexual intercourse, real and simulated;

b) acts of anal intercourse, real and simulated;

c) acts of cunnilingus, real and simulated;

d) acts of fellatio, real and simulated;

e) acts of other sexual activity, including but not limited to photographs of persons fondling female breasts, and persons fondling the genitals of themselves and of others, both men and women.

5.

The signs on the exterior of the building on said premises housing the Harem Book Store, which is located on a main thoroughfare in the City of Atlanta, are designed and calculated to convey to adult male viewers the message that the material for sale within is of a salacious and prurient nature.

6.

Within said building in said place of business there are stored, sold and exhibited for sale imitations of large erect penises and other phallic objects, in immediate juxtaposition to books, magaines and motion picture films of the nature set forth in this complaint. A suggestively garbed female dummy with vagina exposed also occupies a prominent position in said building.

7.

Plaintiffs say that the business of the Harem Book Store is the commercial exploitation of erotica solely for the sake of their prurient appeal.

8.

Plaintiffs say, further, that the books, magazines, and motion picture films so being advertised, stored, sold and exhibited for sale are commingled and not segregated by categories having regard for such as is within and such as is without the protection of the First Amendment of the Constitution of the United States and Art. 1, Sec. 1, Par. 15 of the Georgia Constitution (Code Ann., Sec. 2-115). Said books, magazines and motion picture films and said imitation penises and phallic objects constitute one stock of merchandise all of which is pandered as being in the nature of hard-core pornography and the major portion or a substantial

portion of such stock of merchandise is such hard-core pornography, and plaintiffs say that the entire stock of merchandise is accordingly subject to condemnation and forfeiture. Attached hereto and incorporated by reference as Plaintiff's Exhibit "A" are a series of photographs which truly and accurately portray the exterior signs, interior displays of the aforesaid materials, imitation penises and the female dummy referred to in paragraph Six.

9.

On July 28, 1971, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

a) Sex in Marriage, The Photo Magazine of Marital Sex Education, Volume One, Number Two, $6.00, Academy Magazines Division of Academy Press, publisher.
b) Primer of Sexual Education, Volume Three, $600, Calga Publishers.
c) The Sexual Man, Collector's First Edition, Vol. 1, $6.00, SECS Press.

The sale of each of said magazines was unlawful because each and all of said magazines were obscene within the meaning of Georgia Code Section 26-2101.

10.

On August 14, 1971, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

a) Cavewomen, A.P.E.C. Magazine No. 25, $3.50, Publisher's Export Company, Inc.

b) The Savages, A.P.E.C. Magazine No. 14, $3.50 Publisher's Export Company, Inc.
c) Foreplay, A Sensuous New Erotic Probe into the World of Sex, $6.00

The sale of each of said magazines was unlawful because each and all of said magazines were obscene within the meaning of Georgia Code Section 26-2101.

11.

On November 24, 1971, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

a) AWARE, Volume One, Number Two, $6.00.

The sale of each of said magazine was unlawful because each and all of said magazine was obscene within the meaning of Georgia Code Section 26-2101.

12.

On May 31, 1972, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

a) More Than 7 Inches, #2, $6.00.

b) Gay Sex Guide, Volume 1, $6.00.

c) Affaire, No. 7, $7.50.

d) Love Theme, Vol. 1, No. 4, $4.50.

e) The Special, No. 5, $5.00, Pnd.

f) Affaire, No. 9, $6.00.

The sale of each of said magazines was unlawful because each and all of said magazines were obscene within the meaning of Georgia Code Section 26-2101.

WHEREFORE Plaintiffs demand:

1) Summons and an appropriate order for service of summons issued, and of all rules and orders.

2) For an interlocutory injunction:

a) For injunctions, both temporary and permanent, against the conduct and operation of the Harem Book Store, in and on the premises at No. 2979 Campbellton Road, S.W., in the city of Atlanta, Fulton County, Georgia, by any person.

b) For an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forefeited and destroyed.

3) That a Rule Nisi be issued instanter requiring the defendants named herein to show cause why the prayers of this complaint should not be granted.

Respectfully submitted,

/s/ CARTER GOODE
Assistant District Attorney
Atlanta Judicial Circuit

/s/ JOEL M. FELDMAN
Assistant District Attorney
Atlanta Judicial Circuit

/s/ THOMAS E. MORAN, JR.,
Assistant Solicitor General
Criminal Court of Fulton County

THE SUPERIOR COURT FOR THE COUNTY OF FULTON STATE OF GEORGIA

LEWIS R. SLATON AS DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT, AND HINSON MCAULIFFE AS SOLICITOR GENERAL, CRIMINAL COURT OF FULTON COUNTY, GEORGIA

vs. CIVIL ACTION,

CERTAIN PREMISES AT NO. 2979 CAMPBELLTON ROAD, S.W., ATLANTA, FULTON COUNTY, GEORGIA; THE BUSINESS CONDUCTED THEREON, KNOWN AS THE HAREM BOOK STORE; THE OBSCENE MATERIALS IN AND ON SAID PREMISES; JAMES L. CHANDLER, LESSEE OF SAID PREMISES; AND ALL OTHER PERSONS ASSISTING AND ABETTING IN THE OPERATION OF THE HAREM BOOK STORE

FILE NO. _____
COMPLAINT

VERIFICATION

Personally comes Joel M. Feldman, who, being first duly sworn, on oath says that he is an Assistant District Attorney of the Atlanta Judicial Circuit; that he is an attorney for the

plaintiffs in the captioned complaint; that he has knowledge of the facts stated in said complaint; and that the allegations of fact in said complaint are true.

/s/ JOEL M. FELDMAN

Sworn to and subscribed before me this the 21 day of Aug., 1972.

/s/ Juanita Kersein
Notary Public GA. State at Large

THE SUPERIOR COURT FOR
THE COUNTY OF FULTON
STATE OF GEORGIA

LEWIS R. SLATON AS DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT, AND HINSON MCAULIFFE, AS SOLICITOR GENERAL, CRIMINAL COURT OF FULTON COUNTY, GEORGIA

vs.

CERTAIN PREMISES AT NO. 2979 CAMPBELLTON ROAD, S.W., ATLANTA, FULTON COUNTY, GEORGIA; THE BUSINESS CONDUCTED THEREON, KNOWN AS THE HAREM BOOK STORE; THE OBSCENE MATERIALS IN AND ON SAID PREMISES; JAMES L. CHANDLER, LESSEE OF SAID PREMISES; AND ALL OTHER PERSONS ASSISTING AND ABETTING IN THE OPERATION OF THE HAREM BOOK STORE

CIVIL ACTION,
FILE NO. _____
COMPLAINT

ORDER

This complaint having been read and considered:

IT IS ORDERED:

1. That summons issued and service be made by the sheriff, instanter upon

   a. The premises known as the Harem Book Store, located at 2979 Campbellton Road, S.W., Atlanta, Fulton County, Georgia by posting a copy of the complaint, summons, and this order in a conspicuous place in said premises and personally the persons located therein and in charge of said premises.

   b. James L. Chandler, Apartment C-5, 3649 Buford Highway, DeKalb County, Georgia.

Said summons shall require the Respondents to show cause, within 48 hours from service thereof, before this court, why the prayers of the complaint should not be granted.

2. Respondents show cause before me, then and there to be heard, at 9:30 A.M., the 25 day of Aug., 1972 why the prayers of the complaint should not be granted.

This the 21 day of Aug., 1972.

/s/ CLAUDE D. SHAW
JUDGE, FULTON SUPERIOR COURT
Atlanta Judicial Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALVIS G. SPEIGHT t/a
HAREM BOOK STORE and
JAMES L. CHANDLER,
Plaintiffs,
versus
LEWIS R. SLATON,
In His Capacity as
District Attorney,
Atlanta Judicial Circuit; and
HINSON McAULIFFE,
In His Capacity as
Solicitor General, Criminal
Court of Fulton County,
State of Georgia,

Defendants,
Jointly and Severally.

CIVIL ACTION
FILE NUMBER _____

AFFIDAVIT OF ROBERT EUGENE SMITH, ESQ. IN SUPPORT OF INJUNCTION AND DECLARATORY RELIEF

STATE OF GEORGIA

COUNTY OF FULTON

ROBERT EUGENE SMITH, being first duly sworn, deposes and says:

1. I am an attorney licensed to practice in the State of Maryland, and one of the attorneys representing Plaintiffs in the above styled and numbered cause.

2. It is my opinion that the Georgia statutes under which Defendants herein purport to act are unconstitutional as written and applied in the factual context set forth in the Complaint to which this Affidavit is attached and represents a constitutionally prohibited prior restraint.

3. My experience in the obscenity area has been extensive and I have argued the following obscenity cases in the United States Supreme Court orally or by brief:

A. *Central Magazine Sales, Ltd. v. United States,* 389 U.S. 50 (1967).

B. *Bloss v. Dykema,* 398 U.S. 278 (1970).

C. *Bloss v. Michigan,* 402 U.S. 928 (1971).

D. *Burgin v. South Carolina,* 404 U.S. 806 (1971).

E. *United States v. The Book Bin,* 400 U.S. 410 (1971).

F. *Mitchum v. Foster,* 407 U.S. 225, 32 L.Ed.2d 705 (1972).

I have also argued numerous cases in the United States Courts of Appeal, United States District Courts, and multiple State Appellate Courts.

I have appeared in cases in approximately thirty-eight (38) states of the United States in connection with the procedural and substantive factors involved in the area of obscenity litigation.

4. I further appeared in the case of *United States v. The Book Bin* in this jurisdiction on behalf of Respondent before Circuit Judge Morgan and District Judges Edenfield and Hooper, wherein it was held, in part, that the action proposed to be taken by the United States Attorney under color of enforcing *39 U.S.C. § § 4006 and 4007,* was unconstitutional as a prohibited prior restraint and for not setting forth procedural safeguards, as was required by the United States Supreme Court in the case styled *Freedman v. Maryland,* 380 U.S. 51 (1965).

5. In the case of *Mitchum v. Foster, supra,* decided by the United States Supreme Court June 19, 1972, the question there involved was the jurisdiction of the Federal Court to intervene in a State Court civil proceeding which commenced prior to the institution of the Federal action. In that factual situation, a State Judge had ordered an adult bookstore closed and enjoined the proprietors thereof from offering for sale any king of press materials. A Three-Judge statutory court held that the anti-injunction statute, *28 U.S.C.* § 2283 was a bar to injunctive relief in that case, and the proprietors of the bookstore appealed to the United States Supreme Court. Probable Jurisdiction was noted. The case was argued in December 1971 and the Court, in an opinion by Justice Stewart expressing the unanimous view of the Court, held that *Section 1983* constituted an "expressly authorized" exception to Section 2283 and that *Section 2283* did not preclude injunctive relief in the nuisance case before it involving the prior restraint.

6. On June 26, 1972, the United States Supreme Court granted *certiorari* in the case of *Paris Adult Theatre v. Slaton,* No. 71-1051, along with two other cases, *Alexander v. Virginia,* No. 71-1315, and *Kaplan v. California,* No. 71-1422. At issue in the *Paris Adult Theatre* case were the following questions:

1. "Whether the two motion picture films which are the subject matter of these proceedings, and determined by the Trial Court to be not obscene, but by the Supreme Court of the State of Georgia to be obscene, are not obscene in the constitutional sense and are protected expression under the *First* and *Fourteenth Amendment* to the *United States Constituiton?*"

2. "Whether there can be a constitutionally valid judicial determination of obscenity as to each of the films brought before the Supreme Court, consistent with Petitioners' rights to procedural and substantive due

process required by the *Fifth* and *Fourteenth Amendments* to the *Constituion of the United States,* in the absence of any affirmative evidence on each of the constitutionally relevant elements of the standards for judging proscribable obscenity under the *First Amendment*?"

3. "Whether the State of Georgia may, consistent with the *First, Fourth, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States,* utilize *ad hoc* procedures to enjoin dissemination of presumptively protected *First Amendment* materials where there is no statutory or authoritative judicial decision authorizing the same with appropriate procedural safeguards?"

A copy of the Petition for Certiorari in the *Paris Adult Theatre* case is attached hereto as Exhibit No. 1 in support of this Affidavit, and a copy of the letter from the Clerk's Office of the United States Supreme Court notifying counsel of the grantin g of the certiorari and of the request of the Court to brief and argue an additional question

4. "Whether the display of any sexually oriented films in a commercial theatre, when surrounded by notice to the public of their nature and by reasonably protection against exposure of the film to juveniles is constitutionally protected?"

is attached hereto as Exhibit No. 2 in support of this Affidavit. The Petitioners' Brief in the *Paris Adult Theatre* matter, due in the United States Supreme Court on August 25, 1972, is attached hereto as Exhibit No. 3 in support of this Affidavit.

7. Some of the very issues which Defendants seek to raise in the so-called nuisance action are well-known to them to be now before the United States Supreme Court.

8. In the Complaint filed by Defendants herein (which is attached as Exhibit "A" to Plaintiffs' Complaint in the within proceedings), it is alleged that the press materials offered for sale at the Harem Book Store consist of:

> "books, magazines and motion picture films, each and all of which contain photographs, still or moving, of one or more of the following:
>
> a) acts of sexual intercourse, real and simulated;
>
> b) acts of anal intercourse, real and simulated;
>
> c) acts of cunnilingus, real and simulated;
>
> d) acts of fellatio, real and simulated;
>
> e) acts of other sexual activity, including but not limited to photographs of persons fondling female breats, and persons fondling the genitals of themselves and of others, both men and women."

Contrary to the verification affidavit filed by Joel M. Feldman as one of the attorneys for the Defendants, the United States Supreme Court has held that the various classifications of materials, represented by the designation of Mr. Feldman, not to be obscene in the constitutional sense and a schedule of cases representing the description of materials held not to obscene by the United States Supreme Court is attached hereto as Exhibit No. 4 in support of this Affidavit.

9. The United States Supreme Court has a matter now pending before it involving the use of a nuisance law to stop the showing of a film in the case of *Grove Press, Inc. v. Flask*, No. 70-2, which is an appeal from a statutory Three-Judge Court, docketed July 6, 1970. This case involves, in part, a concept of public nuisance, and it is the second oldest case on the docket of the Court, which is, as of this date, still undisposed of. 41 LW 3005.

10. In the recent case of *Rabe v. Washington*, 405 U.S. 313 (1972), Mr. Justice Burger, in a separate opinion joined in by Mr. Justice Rehnquist concurring with the other seven members of the Court, stated as follows with regard to the issue of nuisance:

> "Public display of explicit materials such as are described in this record are not significantly different from any noxious public nuisance traditionally within the power of the States to regulate and prohibit, and, in my view involve no signficant countervailing *First Amendment* considerations."

It is interesting to note that only one member of the Court other than the Chief Justice joined in this concept with regard to noxious public nuisance. To put Mr. Justice Burger's concept of public nuisance in focus, it should be noted that the public displays implicated in the factual situation before the Court in *Rabe v. Washington, supra*, included the following elements: (1) the screen of the outdoor drive-in theatre was clearly visible to all motorists passing over a nearby public highway; (2) there were twelve to fifteen nearby family residences which were confronted with a view of the screen from their premises; and (3) young children were often observed viewing sexually-oriented films on the screen of the outdoor theatre from outside the chainlink fence surrounding the theatre grounds. It was to this factual context, and this context only, that Justice Burger addressed his remarks.

Mr. Feldman's affidavit and the complaint to which it is attached would have us believe that the identification of a bookstore selling press materials to interested adults where the outside of the store contains forewarning to adults of the character of the material offered therein is, in effect, an exploitation to a prurient interest of adult materials, when, in truth and in fact, the forewarning and prohibition of juveniles of entering the store is a good faith effort on the part of Plaintiffs herein to follow the guidelines set down by the United States Supreme Court in *Redrup v. New York,* 386 U.S. 767, and its thirty-four progeny cases which have been decided since that time.

See also, *Alexander v. Virginia,* No. 71-1315, wherein The United States Supreme Court, in addition to the questions presented in the Petition for Certiorari, directed counsel to brief and argue the following:

> "Whether the display of any sexually-oriented pictorial magazines for commercial sale, when surrounded by notice to the public of their nature and by reasonably protection against exposure of the magazines to juveniles, is constitutionally protected?"

The United States Supreme Court, in *Kaplan v. California,* No. 71-1422, granted certiorari on June 26, 1972, and one of the questions presented was as follows:

> "Whether California Penal Code §§ 311 and 311.2, as construed and applied to authorize the judgment of conviction of petitioner herein, where the sole evidence in the record establishes that petitioner, a retail book seller, sold the book to an adult who requested the book and purchased it, ostensibly for his personal use, and where the prosecution neither sold the material in his book store to minors nor thrust it upon the general public and engaged in no 'pandering' of ther material, deprive petitioner of his

liberty and property without due process of law and abridge petitioner's exercise of freedoms of speech and press, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments?"

11. In the proceedings at bar, the record establishes conclusively that the press materials offered for sale at the Harem Book Store, to interested adults only, and surrounded by notice to the public of their nature and by reasonable protection against exposure of the press materials to juveniles, would be constitutionally protected. The United States Supreme Court, by raising these questions on its own motion has demonstrated that the question first hinted at in *Stanley v. Georgia,* 394 U.S. 567, and not resolved by *United States v. Reidel,* 402 U.S. 351 (1971) and *United States v. Thirty-Seven Photographs,* 402 U.S. 363 (1971), is a very substantial one.

12. The *ad hoc* procedural devices being utilized by Defendants herein, as well as the substance of the relief which they seek in the State Court, under color of enforcement of the State of Georgia Obscenity and Nuisance statutes, as set forth in the Complaint to which this Affidavit is attached, clearly presents a proper question for adjudication by this Court, and the institution of the proceedings in the State Court in view of the factual background set forth, represents bad faith enforcement of the law, designed to harass the Harem Book Store out of business during this election year.

/s/ Robert Eugene Smith, Esquire

SWORN TO AND SUBSCRIBED before me, this 28th day of August, 1972.

/s/ C.L. Stovall
Notary Public, Georgia State at Large
My Commission Expires Sept. 15, 1975.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALVIS G. SPEIGHT t/a
HAREM BOOK STORE and
JAMES L. CHANDLER,
Plaintiffs

v. CIVIL ACTION NO. 17,075

LEWIS R. SLATON, District
Attorney, Atlanta Judicial
Circuit; and HINSON MCAULIFFE,
Solicitor General, Criminal
Court of Fulton County, Georgia,
Respondents

ANSWER
(Filed September 13, 1972)

Comes now LEWIS R. SLATON, District Attorney of the Atlanta Judicial Circuit, and HINSON MCAULIFFE, Solicitor General of the Criminal Court of Fulton County, Georgia, Respondents named herein, and file their answer, without waiving any other right available to them.

FIRST DEFENSE OF LAW

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE OF LAW

Since the Petitioners are seeking merely to enforce an alleged "private right" this court should decline, under comity, to intervene in an action already commenced in a state court of competent jurisdiction in which any claimed right of the Petitioner can be fully considered and protected;

THIRD DEFENSE OF LAW

Since the Petitioners have made a constitutional attack on a new state statute, which statute has not yet been considered by the state courts, this court should abstain from considering the case until the state courts have had an opportunity to consider the same.

FOURTH DEFENSE OF LAW

This court is without jurisdiction to consider the complaint for the following reasons to wit:

a) The action does not involve any deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage of any right, privilege or immunity secured by the United States Constitution and the laws within the meaning of 28 U.S.C. Sec. 1343(3), or 42 U.S.C. Sec. 1983.

b) This action does not involve any deprivation of civil rights under which petitioners would be entitled to recover damages, or to secure equitable or other relief under any act of congress or the United States Constititution, within the meaning of 28 U.S.C. Sec. 1343(4).

FIRST DEFENSE OF FACT

A. Answering Part I, Jurisdiction of the Petition, to wit:

1.

The first three paragraphs (1, 2, 3) require no answer. While paragraph four requires no specific answer, in *Gable v. Jenkins,* 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595 (1970) the Supreme Court summarily affirmed an unreported

decision of a three-judge U.S. District Court of the Northern District of Georgia (_____ F. Supp. _____ (No. 13001, Oct. 1969)) recognizing Georgia's authority to formulate procedures whereby adversary proceedings for the seizure of obscene materials might be had, even where no statutory procedure therefore existed. See also, *Johnny Rebs et al v. Slaton,* 401 U.S. 985, 91 S. Ct. 1220 (1971) affirming 309 F. Supp. 998 (1970). Furthermore, the procedure attempting to be utilized by the Respondents will accomplish the purpose of affording the Petitioner's any adversary hearing to which they may be entitled. See also, *U.S. v. Reidel,* 91 S. Ct. 1410, 1412 (1971).

2.

The first two subparagraphs of paragraph 5 are denied. Subparagraphs 3, 4 and 5 of said paragraph require no answer. For want of knowledge sufficient to form a belief Respondents can neither admit nor deny the last subparagraph of said paragraph; and Respondents demand strict proof thereof.

B. Answering Part II, Parties:

1.

Respondent is without sufficient information to form a belief as to whether or not Alvis G. Speight operates the Harem Book Store, particularly, as alleged in the first subparagraph of paragraph 6, since the application for business license for said business filed with the city of Atlanta listed James L. Chandler as the owner of said business. Further answering said subparagraph Respondents deny that either Petitioner Speight or Petitioner Chandler are engaged in the sale or offering for sale of books, magazines, newspapers, movie films, pictures or other press materials protected by the First Amendment to the United States Constitution, but rather that both Speight (if he is the operator of said

business) and Chandler are engaged in the sale, offering for sale and exhibition for sale of hard core pornography; and that any items sold, offered for sale, or exhibited for sale not constituting hard core pornography are sold, offered for sale, or exhibited for sale co-mingled with the heretofore-mentioned items of hard core pornography, with no distinction made by petitioners between the two classifications, if indeed there be items other than hard core pornography involved; and that since said items constitute hard core pornography they are outside of the protection offered by the First Amendment to the United States Constitution.

Further answering said paragraph 6, Respondents deny the second subparagraph thereof; and are without information sufficient to form a belief as to whether or not such sales or offerings are made by Petitioners to persons under the age of eighteen years, are pandered, or whether or not such materials are offered for sale in a way impermissibly intruding upon and into the privacy of unwilling adults wishing to avoid confrontation therewith as alleged in the second subparagraph of paragraph 6. Further answering said subparagraph, Respondents aver that said bookstore is located in a commercial section of the city of Atlanta between private residences and Therrell High School, a public school in the city of Atlanta having minor students; and that said minor students cannot help but be subjected to the display of said materials to and from their homes and school.

Further answering said paragraph, and the last subparagraph thereof, Respondent is without information sufficient to form a belief as to the allegations contained in said sub-paragraph.

2.

Answering Paragraph 7, Respondents are without information sufficient to form a belief as to the allegations

since the application for a business license for Harm Book Store filed with the city of Atlanta lists James L. Chandler as the owner of said business.

3.

Paragraphs 8 and 9 are admitted. Paragraph 10 requires no answer.

C. Answering Part III, Factual Allegations,

1.

Paragraphs 11, 12, 16, 17, 18, 19 are denied as alleged. Paragraph 15 is admitted. For lack of knowledge sufficient to form a belief Respondents can neither admit nor deny the allegations of paragraph 13. That portion of paragraph 14 comprising the first sentence and the first clause of the second sentence ending with the words "constitutional sense" are admitted. The balance of said paragraph requires no answer although Respondents deny that such materials are not obscene, but rather Respondents aver that such materials are obscene.

2.

Further answering said paragraphs Respondents admit instituting a suit against certain of the Petitioners, as set out in paragraph 16, that the same was done in good faith; and that the material quoted in said paragraph is substantially correct.

3.

Further answering paragraph 17, Respondents admit that Hon. Claude D. Shaw signed the order in question, but deny that said order is repugnant to the United States Constitution.

D. Answering Part IV, Bases in Law for Relief:

1.

Paragraphs 22, 23, 24, 25, 26, 27 and all of their subparagraphs are denied.

E. Answering Part V, Relief Sought:

1.

Paragraphs 28 and 29 are denied.

SECOND DEFENSE OF FACT

The allegations contained in Fulton County Complaint No. B-77630, attached to the Petition as Exhibit "A" thereof, are adopted as Respondent's second defense of fact, and incorporated by reference herein.

WHEREFORE having fully answered said complaint Respondents pray:

1) That this answer be inquired into;

2) That this court dismiss the complaint;

3) That in the alternative this court

a) Exercise the doctrine of comity, and allow the State Court proceeding to continue; or

b) Exercise the doctrine of abstension, and allow the State Court proceeding to continue;

4) That this court grant to the Respondents such other and further relief as is authorized in law and equity.

JOEL M. FELDMAN
Assistant District Attorney

CARTER GOODE
Assistant District Attorney

TOM MORAN, JR.
Assistant Solicitor General

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Joel M. Feldman, hereby certify that I have this day served a copy of the foregoing Answer upon the following attorneys at their post office addresses of record, Mr. Freeman Hutton, Suite 2005, 1175 Peachtree, N.E., Atlanta, Georgia 30309; Mr. R.E. Smith, Suite 507, 102 W. Pennsylvania Avenue, Towson, Maryland, 21204; Mr. G. Deitch, Suite 2005, 102 W. Pennsylvania Avenue, Towson, Maryland, 21204; Mr. G. Deitch, Suite 2005, 1175 Peachtree, N.E., Atlanta, Georgia 30309.

This 11 day of September 1972.

JOEL M. FELDMAN
Of Counsel for Respondents.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALVIN G. SPEIGHT t/a
HAREM BOOK STORE, and
JAMES L. CHANDLER,
Petitioners

vs. CIVIL ACTION NO. 17075

LEWIS R. SLATON, District
Attorney of the Atlanta
Judicial Circuit, and
HINSON MCAULIFFE, Solicitor
General of the Criminal Court
of Fulton County, Georgia,
Respondents.

PROPOSED STIPULATIONS OF FACT AND CONCLUSIONS OF LAW

Comes now LEWIS R. SLATON and HINSON MCAULIFFE, Respondents named herein and, in accordance with this Court's instructions, submit their proposed stipulations of fact and conclusions of law; and, which proposed stipulations of fact and conclusions of law are being simultaneously submitted to counsel for the Petitioners. Respondents, however, do not believe that counsel for the Petitioners and counsel for the Respondents will be able to reach any agreement as to any such stipulations of fact and conclusions of law, and Respondents, therefore respectfully request that this Court enter an order directing the Petitioners to furnish to the Court at least by December 21, 1972, four copies of each of the publications named in the original petition filed by the Respondents in the Superior Court of Fulton County, Georgia, in case number B-77630, paragraphs 9, 10, 11, and 12. Respondents make this request since the only copies of said publications possessed by Respondents were tendered to Fulton Superior Court Judge Claude Shaw at the time the petition was filed by Respondents with said Judge.

A. *Proposed Findings of Facts*

1. At all material times a business known as the Harem Book Store was and is located and being carried on at the premises known as 2979 Campbellton Road, S.W., Atlanta, Fulton County, Georgia; this location is in a commercial section of the City of Atlanta on a main thoroughfare between private residences and Therrell High School, a public school of the City of Atlanta, having students of ages between 13 and 18 years which students cannot help but be exposed to advertising and display of hard-core pornographic materials at said premises.

2. On July 9, 1971 plaintiff James L. Chandler made an application to the business license division of the City of Atlanta for a business known as the Harem Book Store, located at 2979 Campbellton Road, S.W., Atlanta, Georgia.

3. On said application made under oath said Chandler claimed himself as the sole owner of said business.

4. As of August 21, 1972, there had been no change in the information contained in the said application, that is, that no application has ever been filed with the City of Atlanta business license division requesting that Alvis G. Speight be shown as the owner of said business, rather than James L. Chandler, nor had said Speight applied for a license for a business to be operated on the same premises.

5. Said business is exclusively engaged in the retail sale of books, magazines and motion picture films dealing with matters of a sexual nature, and of mechanical devices relating to the act of sexual intercourse (which mechanical devices include; but are not limited to, artificial vaginas and artificial penises).

6. Said business has a large turnover of retail sales clerks.

7. (a) On July 28, 1971 at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

1. Sex in Marriage, The Photo Magazine of Marital S Education, Volume One, Number Two, $6.00, Academy Magazines Division of Academy Press, publisher.

2. Primer of Sexual Education, Volume Three, $6.00, Calga Publishers.

3. The Sexual Man, Collector's First Edition, Vol. 1, $6.00, SECS Press.

(b) On August 14, 1971, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

4. Cavewomen, A.P.E.C. Magazine No. 25, $3.50, Publisher's Export Company, Inc.

5. The Savages, A.P.E.C. Magazine No. 14, $3.50 Publisher's Export Company, Inc.

6. Foreplay, A Sensuous New Erotic Probe into the World of Sex, $6.00.

(c) On November 24, 1971, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazine to an adult member of the general public, to wit:

7. AWARE, Volume One, Number Two, $6.00.

(d) On May 31, 1972, at said premises an employee of Defendant, The Harem Book Store, sold certain hereinafter entitled described magazines to an adult member of the general public, to wit:

8. More Than 7 Inches, No. 2, $6.00.

9. Gay Sex Guide, Volume 1, $6.00.

10. Affaire, No. 7, $7.50.

11. Love Theme, Vol. 1, No. 4, $4.50.

12. The Special, No. 5, $5.00, Pnd.

13. Affaire, No. 9, $6.00.

8. That the magazines numbered 1,2,3,5,6, and 7 contain one or more photographs of the act of coitus.

9. That the magazines numbered 4, 6, and 11 contain one or more photographs of either actual or simulated coitus, and are intended to convey to the viewer of same the impression that an act of coitus is being photographed.

10. That the magazines numbered 3, 5, and 9 contain one or more photographs of the act of pederasty (penetration per anus).

11. That the magazines numbered 8, 9, 10, 11 and 13 contain one or more photographs of either actual or simulated pederasty; and are intended to convey to the viewer of the same the impression that an act of pederasty is being photographed.

12. That the magazines numbered 1, 2, 3, 4, 5, 6, and 7 contain one or more photographs of a man performing cunnilingus upon a woman; and that magazines numbered 1, 2, 3, 5, 6, and 11 contain one or more photographs of a woman performing cunnilingus upon another woman.

13. That the magazines numbered 1, 2, 3, 4, 6, 7, 11 and 12 contain one or more photographs of either actual or simulated cunnilingus performed by a man, and are intended to convey to the viewer of same the impression that an act of cunnilingus is being photographed; and that the magazines 2, 3, 6 and 12 contain one or more photographs of either actual or simulated cunnilingus perfomed by a woman upon another woman, and are intended to convey to the viewer of same the impression that an act of cunnilingus is being photographed.

14. That the magazines numbered 2, 3, and 9 contain one or more photographs of a man performing fellatio upon another man; and that the magazines numbered 1, 2, 3, 6 and 7 contain one or more photographs of a woman performing fellatio upon a man.

15. That the magazines numbered 3, 5, 9, 10 and 13 contain one or more photographs of either actual or simulated fellatio performed by a man upon another man, and are intended to convey to the viewer of same the impression that an act of fellatio is being photographed; and that the magazines numbered 2, 3, 6 and 12 contain one or more photographs of either actual or simulated fellatio performed by a woman upon a man, and are intended to convey to the viewer of same the impression that an act of fellatio is being photographed.

16. That the magazines numbered 1, 2, 3, 4, 6, 7, 11, and 12 contain one or more photographs of a man fondling a woman's breast; and that the magazines numbered 3, 4, 6, and 11 contain one or more photographs of a woman fondling another woman's breast.

17. That the magazines numbered 1, 2, 3, 4, 5,6, 7, 11 and 12 contain one or more photographs of a man fondling a woman's genitals; and that the magazines numbered 2, 3, 4, and 6 contain one or more photographs of a woman fondling another woman's genitals.

18. That the magazines numbered 3, 8, 9, 10 and 13 contain one or more photographs of a man fondling another man's genitals; and that the magazines numbered 1, 2, 3, 5, 7, 11, and 12 contain one or more photographs of a woman fondling a man's genitals.

19. That the magazines numbered 6, 7, and 11 contain one or more photographs of a woman fondling her own breasts; that the magazines numbered 1, 2, 3, 6 and 7 contain one or more photographs of a woman fondling her own genitals; and that the magazines numbered 3, 8, 9 and 10 contain one or more photographs of a man fondling his own genitals.

20. That the magazine numbered 2 contains one or more photographs of a woman fondling another person's anus.

21. That the magazines numbered 1, 2, and 3 contain one or more photographs of an artificial penis being used upon a woman.

22. That the magazines numbered 1, 2, 3, 6, 7, 8 and 9 contain one or more photographs of a penis in the act of ejaculation.

23. That the magazine numbered 9 contains one or more photographs of a man urinating upon another man.

24. That the magazines numbered 1, 2, 3, 5, 6, 7, 8, 9, 11, and 13 contain at least some text, while magazines numbered 4, 10 and 12 contain no text.

25. That the magazines numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 are obscene, hard-core pornography as a matter of fact.

26. That the Petitioner knew what was contained in each of the aforesaid magazines, as well as what was contained in each magazine, book and motion picture film offered for and displayed for sale at said premises, and sold by Petitioners, their agents and employees at said premises.

27. Said premises and business have been used, are now being used, and, unless prevented by judicial action, will continue to be used for the advertising, storage, sale and exhibition for sale of materials obscene within the meaning of Section 26-2101 of the Criminal Code of Georgia. Said activities are being conducted by the aforesaid Chandler, and by various agents, servants and employees of the aforesaid Chandler whose names and addresses are not alleged because of the rapid rate of change or turnover in such personnel.

28. In addition to the magazines specifically described above, the materials advertised for sale, exhibited for sale and sold at said premises consist of books, magazines, and motion picture films, each and all of which contain photographs, still or moving, of one or more of the following:

a) acts of sexual intercourse, real and simulated;

b) acts of anal intercourse, real and simulated;

c) acts of cunnilingus, real and simulated;

d) acts of fellatio, real and simulated;

e) acts of other sexual activitity, including but not limited to photographs of persons fondling female breasts, and persons fondling the genitals of themselves and of others, both men and women.

29. The signs on the exterior of the building on said premises housing the Harem Book Store, which is located on

a main thoroughfare in the City of Atlanta, are designed and calculated to convey to adult male viewers the message that the material for sale within is of a salacious and prurient nature.

30. Within said building in said place of business there are stored, sold and exhibited for sale imitations of large erect penises and other phallic objects, in immediate juxtaposition to books, magazines and motion picture films of the nature set forth in this complaint. A suggestively garbed female dummy with vagina exposed also occupies a prominent position in said building.

31. That the business of the Harem Book Store is the commercial exploitation of erotica solely for the sake of their prurient appeal.

32. That the books, magazines, and motion picture films as being advertised, stored, sold and exhibited for sale are commingled and not segregated by categories having regard for such as is within and such as is without the protection of the First Amendment of the Constitution of the United States and Art. 1, Sec. 1, Par. 15 of the Georgia Constitution (Code Ann., Sec. 2-115). Said books, magazines and motion picture films and said imitation penises and phallic objects constitute one stock of merchandise all of which is pandered as being in the nature of hard-core pornography and the major portion or a substantial portion of such stock of merchandise is such hard-core pornogrpahy, and plaintiffs say that the entire stock of merchandise is accordingly subject to condemnation and forfeiture.

33. That the photograph attached to the Petition filed by Respondents in Case No. B-77630, therein as Plaintiff's Exhibit "A", truly and accurately represent the exterior signs, interior displays of the aforesaid materials, imitation penises and the female dummy referred above.

34. That the New Amendment to the Georgia obscenity law (Ga. Code Chapter 26-21), adopted by the General Assembly of Georgia in 1971 as Georgia Code Section 26-2103 et seq. (Georgia Laws 1971, p. 344, which sections provide that any premises used in violation of any provision of the said chapter constitutes a public nuisance, has not yet been considered by any Georgia Court of Original Jurisdiction, nor has the same been construed or interpreted by any Georgia Court of Appellate Jurisdiction.

B. *Proposed Conclusions of Law*

1. The Georgia obscenity laws (Code Sections 26-2101 et seq.), at least as they related to this case, are constitutional. *Gable v. Jenkins,* 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595 (1970), affirming 309 F. Supp. 998 (N.D. Ga., Oct., 1969; *Gornto v. Georgia,* 227 Ga. 46 (1970), Cert. Den. 402 U.S. 933 (1971), see also 336 F. Supp. 1372 (1972).

2. The state is not limited in controlling obscene materials to criminal prosecutions. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1956).

3. In addition to criminal prosecutions the State may also utilize injunctive procedures to control obscenity. *Kingsley Books, Inc. v. Brown* Id @ 441; *Freedman v. Maryland,* 380 U.S. 51, 60 (1960); *Grove Press, Inc. v. City of Philadelphia,* 418 F.2d 82 (3rd Cir., 1962).

4. Obsenity is not protected by the First Amendment to the United States Constitution. *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (19).

5. Although a person is entitled to be free from governmental interference within the confines of his home as to his choice of reading material, including obscene materials (*Stanley v. Georgia,* 394 U.S. 577, 89 S.Ct.

1243, 22 L.Ed.2d 542 (1968)) this privilege grants no right to such a person to receive obscene materials, or for others to furnish such a willing adult with such materials *United States v. Reidel,* 402 U.S. 351, 356, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971); *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 91 S.Ct. 1400, ___ L.Ed.2d ___ (1971).

6. There is no recognized constitutional right to commercially destribute obscenity to anyone. *United States v. Reidel, supra; United States v. Thirty-Seven Photographs, supra; Milky Way Productions, Inc. v. Leary,* 305 F. Supp. 288, Aff'd. 397 U.S. 98, 90 S.Ct. 817, ____ L.Ed.2d ____ (1970); *G.I. Distributors, Inc. v. New York,* 20 N.Y.2d 104, 281 NYS 2d 795, cert. den. 389 U.S. 905, 88 S.Ct. 218, ____ L.Ed.2d ____ (1967).

7. Where the issue of whether or not a particular item is obscene (as opposed to hard-core pornography) the State is entitled to treat and consider the material as obscene if the distributor thereof treated and considered the material as such for any purpose. *Ginzburg v. United States,* 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966).

8. The thirteen (13) magazines described in "A" above are obscene as a matter of law, the same being hard-core pornography as that term is defined in *Ginzburg v. United States, Id.* at 463, FN 3.; *United States v. Wild,* 422 F.2d 34, (2nd Cir., 1969) cert. den. _____ U.S. _____ (9 Cr. L. 4046, 1971).

9. The civil rights act (28 U.S.C. Section 1343 (3)(4) under which Petitioners bring their action recognize a distinction between mere "private" rights as opposed to "transcendent public" rights; that injunctive and declaratory relief is generally unavailable to enforce a mere "private" right; and that the "rights" Petitioners seek to enforce fall into the category of "private" rights.

Johnny Reb's Book and Card Shop, et al. v. Slaton, 309 F. Supp. 998 (1970), aff'd. 401 U.S. 985, 91 S.Ct. 1220, _____ L.Ed.2d _____ (1971); *Machesky v. Bizzell,* 414 F.2d 283 (5th Cir., 1969); *Gable v. Jenkins, supra.*

10. The Georgia procedure authorizing injunctions against public nuisances (Ga. Code Chapter 72-2 et. esq., Section 72-201, 72-202) is not unconstitutional. *Kingsley Books, Inc. v. Brown, supra.* See also Section 65, Georgia Civil Practice Act (Ga. Laws 1966, pp. 609, as amended); *Evans Theatre Corporation v. Slaton,* 227 Ga. 377, 382 (3) (1971), cert. den. Nov. 9, 1971, _____ U.S. _____ (40 L.W. 3210).

11. It is appropriate for a three-judge federal court to abstain from considering a new state statute when that state's courts have not yet had an opportunity to consider and construe the statute. *Johnny Reb's Book and Card Shop, et al v. Slaton, supra; Mitcham v. Foster,* _____ U.S. _____ (40 L.W. 4737, 6/19/72); *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, _____ L.Ed.2d _____ (1971); *Samuels v. Mackell,* _____U.S. _____, 91 S.Ct. 769, _____ L.Ed.2d _____ (1971); *Byrne et al v. Karalexis,* _____ U.S. _____, 91 S.Ct. 771, _____ L.Ed.2d _____ (1971); *Perez v. Ledesma,* ____ U.S. ____, 91 S.Ct. 674, ____ L.Ed.2d ____ (1971).

Respectfully submitted,

/s/ LEWIS R. SLATON
District Attorney, A.J.C.

/s/ HINSON MCAULIFFE
Solicitor General, A.J.C.

/s/ JOEL M. FELDMAN
Assistant District Attorney

/s/ CARTER GOODE
Assistant District Attorney

Counsel for Respondents

CERTIFICATE OF SERVICE

I, Joel M. Feldman, hereby certify that I am of counsel for Respondents in the above styled case and that I have this day served a copy of the foregoing upon Mr. D. Freeman Hutton, Mr. Gilbert H. Deitch, and Mr. Robert Eugene Smith by U.S. Mail at their respective post office addresses of record, Suite 2005, 1175 Peachtree Street, N.E., Atlanta, Georgia 30309.

This 27 day of November, 1972.

/s/ JOEL M. FELDMAN
Assistant District Attorney.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALVIS G. SPEIGHT t/a
HAREM BOOK STORE, and
JAMES L. CHANDLER,
Petitioners,
versus CIVIL ACTION NO. 17075
LEWIS R. SLATON, DISTRICT
ATTORNEY OF THE ATLANTA
JUDICIAL CIRCUIT, and
HINSON McAULIFFE, SOLICITOR
GENERAL OF THE CRIMINAL COURT
OF FULTON COUNTY, GEORGIA,
Respondents.

PROPOSED STIPULATIONS OF FACT
AND CONCLUSIONS OF LAW

Come now Petitioners, by and through their attorneys at law, and, in accordance with this Court's instructions, submit their proposed stipulations of fact and conclusions of law to the Court and to Respondents.

A. *PROPOSED FINDINGS OF FACT*

1. At all times material hereunto Petitioner Speight or Petitioner Chandler, trading as the Harem Book Store, located at 2979 Campbellton Road, S.W., Atlanta, Georgia, have been engaged, through agents, servants, and employees, in the sale and offering for sale of books, magazines, newspapers, movie films, pictures, and other press materials which are presumptively protected under the *First Amendment* to the *Constitution of the United States*, pursuant to applicable City of Atlanta business licenses.

2. The press materials offered for sale by the Harem Book Store are comparable to those declared not to be obscene by

the Supreme Court of the United States, and many other inferior Federal Courts, as well as various state appellate courts and, hence, are protected expression under the *First Amendment* to the *Constitution of the United States*, as made applicable to the States under the *Fourteenth Amendment*.

3. No sales or offerings are made by the Harem Book Store to persons under eighteen years of age (minors) of any of the sexually-oriented press materials distributed or offered for distribution by the Harem Book Store, nor are they "pandered" in the *Ginzburg*-sense (*Ginzburg v. U.S.A.*, 383 U.S. 463 [1966]), nor are the press materials sold or offered for sale in a way that intrudes impermissibly into the privacy of an unwilling adult who wishes to avoid confrontation therewith.

4. Prior to July 1, 1972, when the legal age of majority in the State of Georgia was lowered to eighteen (18) years of age from twenty-one (21) years of age, the agents, servants and employees of the Harem Book Store made no sales or offerings to persons under the age of twenty-one (21).

5. The use of the premises at 1979 Campbellton Road, S.W., Atlanta, Georgia, as a bookstore is consistent with the approved usages for property zoned, as it is, in the "C-2" classification.

6. At all times material hereunto, the Harem Book Store has been conducted without any overt breaches of the peace or other interference with the rights of others passing by said premises.

7. On four occasions since the Harem Book Store opened more than one year ago, agents of the Defendant McAuliffe have purchased a total of thirteen (13) magazines which Defendants contend are obscene. None of said magazines has ever been declared to be obscene in the constitutional sense.

8. No person, employee or otherwise, has ever been convicted of the commission of a statutory offense at the premises occupied by the Harem Book Store, including the offense of distributing so-called obscene materials in violation of *Georgia Code* § *26-2101.*

9. Defendants have instituted a civil suit in the Superior Court of Fulton County, Georgia, in bad faith, for the purpose of harassing Plaintiffs, as their interests may appear, and effecting irreparable harm, demanding, *inter alia,*

(a) "... . injunctions, both temporary and permanent, against the conduct and operation of the Harem Book Store, in and on the premises at No. 2979 Campbellton Road, S.W., in the City of Atlanta, Fulton County, Georgia, by any person;" and,

(b) "... an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed;" and

(c) "that a Rule Nisi be issued instanter requiring the defendants named herein (plaintiffs in this action) to show cause why the prayers of this complaint should not be granted."

10. Defendants knew or should have known that no violation of Georgia statutes, to-wit: *Georgia Code* § *26-2101,* has been alleged and proved in any court of law against Plaintiffs herein, or any of their agents, servants, and employees, relating to the Harem Book Store located at 2979 Campbellton Road, S.W., Atlanta, Fulton County, Georgia, prior to the institution of the Complaint.

11. The resort to utilization of the concept or public nuisance authorized by Georgia Statutes by the Defendants in order to shut down the Harem Book Store and forbid press materials to be sold there as well as seeking the forfeiture and

destruction of all the press materials contemporaneously being offered for sale at said store is without regard to whether or not each and every single publication can be said to be obscene in the constitutional sense, and indeed, the said Complaint, as sanctified by verification, states, in part, as follows:

> "Said books, magazines and motion picture films and said imitation penises and phallic objects constitute one stock of merchandise all of which is pandered as being in the nature of hard-core pornography and the major portion or a substantial portion of such stock of merchandise is such hard-core pornography, and plaintiffs say that the entire stock of merchandise is accordingly subject to condemnational and forfeiture." (Exhibit "A", p. 3.)

Further, Defendants also, by their proceedings in enforcement of said Georgia Statutes, attempt to circumvent the safeguards of the criminal process with its requirement of proof beyond a reasonable doubt before a jury and substitute therefore a lesser, civil, burden of proof, to-wit: the preponderance of the evidence standard, and a judge.

12. Said attempt is a bad faith effort to force the cessation of sales of all materials in the said store without regard to whether constitutionally protected.

B. *PROPOSED CONCLUSIONS OF LAW*

1. The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important

l that the standards for judging
ection of freedom of speech and
oes not treat sex in a manner
. *Roth v. U.S.*, 354 U.S. 476, 488

eech unconditionally guaranteed
imately be regulated, suppressed,
The separation of legitimate from
ensitive tolls. *Speiser v. Randall*,
2 L.Ed.2d 1460; *Blount v. Rizzi*,
27 L.Ed.2d 498 (1971).

n Amendment a state is not free
ure it pleases for dealing with
the possible consequences for
ech. *Marcus v. Search Warrant of*
1 S.Ct. 1708, 6 L.Ed.2d 1127

restraint of expression bears a
s constitutional validity. *Bantam*
58, 83 S.Ct. 631, 9 L.Ed.2d 584;
. 697, 51 S.Ct. 625, 75 L.Ed.
v. United States, 403 U.S. 713,
822 (1971); *Organization for a*
U.S. 415, 91 S.Ct. 1575, 29

eorgia Code § 26-2101 (Ga.2.
1971, p. 344) are repugnant to
endments to the *Constitution of*
y are overbroad in that they do
aterials which are sold without
ir nature or without reasonable
of the materials to juveniles. Cf.
Paris Adult Theater v. Slaton, No. 71-1051 and *Alexander v. Virginia*, No. 71-1315, arguments heard in the United States Supreme Court, October 19, 1972.

interests. It is therefore vital
obscenity safeguard the prote
press for material which do
appealing to prurient interest.
(1957).

2. The line between spe
and speech which may legiti
or punished is finely drawn. T
illegitimate speech calls for s
357 U.S. 513, 78 S.Ct. 132,
400 U.S. 410, 91 S.Ct. 423, 2

3. Under the Fourteenth
to adopt whatever procedu
obscenity without regard to
constitutionally protected spe
Property, 367 U.S. 717, 8
(1961).

4. Any system of prior
heavy presumption against its
Books v. Sullivan, 372 U.S. 5
Near v. Minnesota, 283 U.S
1357; *New York Times Co.*
91 S.Ct. 2140, 29 L.Ed.2d
Better Austin v. Keefe, 402
L.Ed.2d 1 (1971).

5. The provisions of G
1968, pp. 1249, 1302, Ga. L
the *First* and *Fourteenth Am*
the United States because the
not limit prosecutions to m
notice to the public of their
protection against exposure

6. The provisions of Ga. Code § 26-2101 G) (Ga. L. 1968, pp. 1249, 1302) are repugnant to the *First, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* because they contain an irrational and arbitrary presumption of the type condemned by the United States Supreme Court in *Leary v. U.S.*, 395 U.S. 6 (1969) becuase it cannot logically be said that the presumed fact, obscenity, is "more likely than not" to flow from the proven fact, commercial exploitation of erotica solely for the sake of its prurient appeal; furthermore, said statutory presumption is further invalid because it denies due process of law and equal protection of the law in that it permits a conviction upon a standard less than that of beyond a reasonable doubt which is guaranteed to a criminal defendant by the Due Process Clauses of the *Fifth* and *Fourteenth Amendments* and by Ga. Code § 26-501 (Ga.L. 1968, pp. 1249, 1266). *Leary v. United States*, 395 U.S. 6 (1969); *Tot v. United States*, 319 U.S. 463 (1943); *United States v. Gainey*, 380 U.S. 63 (1965); *United States v. Romano*, 382 U.S. 136 (1965); Note, "The Unconstitutionality of Statutory Criminal Presumptions," 22 Stanford L. Rev. 341 (1970).

7. Georgia Code § 26-2103 (Ga.L. 1971, pp. 344, 345; Section 2 of Act 304, 1971) and Title 72 of the Georgia Code of 1933, as amended, are repugnant to the *First, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* because said statutes and their application to Plaintiffs constitute a classical 'prior restraint' on materials which are presumptively protected under the *First Amendment* to the *Constitution of the United States. Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965). Cf. *Healy v. James*, 408 U.S. 169, 184 (1972) and *Carroll v. President and Commisioners of Princess Anne*, 393 U.S. 175 (1968); *New Riviera Art Theatre v. State*, 412 S.W.2d 890 (Tenn. 1967);

Mitchum v. Florida, ex rel Schaub, 250 S O.2d 883 (Fla. 1971); *State of Indiana, ex rel Blee v. Mohney Enterprises, et al.,* No. 272 A 92, Indiana Court of Appeals, First District, November 29, 1972.

8. Georgia Code § 26-2103 (Ga.L.1971, pp. 344-345, Section 2 of Act 304, 1971) denies due process and equal protection of the laws to Plaintiffs in that said statute makes a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of a single, isolated transaction as to only one of possibly thousands of presumptively protected publications and materials without any showing of traditional elements necessary to constitute a continuing public nuisance, in violation of the *First, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States. Near v. Minnesota,* 283 U.S. 697 (1931); *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971); *New Riviera Art Theatre v. State,* 412 S.W.2d 890 (Tenn. 1967); *State of Indiana ex rel. Blee v. Mohney Enterprises, et al., supra; Freedman v. Maryland, Supra.*

9. Georgia Code § 26-2103 (Ga. L. 1971, pp. 344, 345, Section 2 of Act 304, 1971) violates the *Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* because it creates a presumption, which is conclusive, that a place of business is a public nuisance on the basis of a single, isolated transaction; said presumption is invalid under the rational connection test for judging said presumptions. *Leary v. United States,* 395 U.S. 6 (1969); *Tot v. United States,* 319 U.S. 463 (1943); *United States v. Romano,* 382 U.S. 136 (1965).

10. Said statutory presumption denies equal protection because it arbitrarily labels a busniess a public nuisance without the necessity for the State to prove the elements of a public nuisance as are set out in Georgia Code § 72-102 and the prerequisites for the abatement of same which are set forth in Georgia Codes, § 72-201, thereby treating this

"public nuisance" differently from others. *Fourteenth Amendment, Constitution of the United States.*

11. Georgia's Nuisance Statute, Title 72 of the Georgia Code of 1933, as amended, as written and or as applied to Plaintiffs, is repugnant to the *Constitution of the United States,* in that it is impermissibly vague, and it is overbroad because susceptible of sweeping and improper application to restrain the dissemination of materials entitled to the protection of the *First* and *Fourteenth Amendments,* all without furthering any overriding state purpose. *McLaughlin v. Florida,* 378 U.S. 184 (1964); *Near v. Minnesota,* 283 U.S. 647 (1931); *Gooding v. Wilson,* 405 U.S. 518 (1972); *Papachristou v. Jacksonville,* 405 U.S. 156 (1972).

12. Georgia's Nuisance Statute, Title 72 of the Georgia Code of 1933, as amended, as written and or as applied to Plaintiffs, is repugnant to the *First* and *Fourteenth Amendments* to the *Constitution of the United States* in that its provisions lack adequate safeguards against undue inhibition of materials which are entitled to the protection of said Amendments. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1957). *Freedman v. Maryland,* 380 U.S. 51 (1965); *Blount v. Rizzi,* 400 U.S. 410 (1971).

13. Georgia Code § 26-2103 (Ga. L. 1971, Section 2, pp. 344, 345) to the extent that it effectuates the suppression of presumtmptively protected materials by closure of a bookstore is, as written and or as applied to Plaintiffs, repugnant to the *First* and *Fourteenth Amendments* to the *Constitution of the United States* because it lacks adequate safeguards against the undue inhibition of materials which are entitled to the protection of said Amendments. *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1957); *Freedman v. Maryland,* 380 U.S. 51 (1965); *Blount v. Rizzi,* 400 U.S. 410 (1971).

14. Georgia Code § 26-2104 (Ga. L. 1971, Section 3, pp. 344, 345) is overbroad and repugnant to the *First* and

Fourteenth Amendments to the *Constitution of the United States* in that it makes contraband all obscene materials and advertisements thereof without regard to whether they are intended for private, as opposed to commercial distribution, and without regard to whether they are distributed in a manner that provides adequate notice as to their nature and reasonable precautions against their exposure to juveniles *U.S. v. Orito*, 338 F. Supp. 308 (1970), appeal pending, United States Supreme Court, No. 70-69, reargued November 7, 1972; *Paris Adult Theatre v. Slaton*, No. 71-1051, United States Supreme Court, and *Alexander v. Virginia*, No. 71-1315, United States Supreme Court, arguments heard October 19, 1972. See also *United States v. Lethe*, 312 F. Supp. 421 (E.D. Calif. 1970).

Respectfully submitted,

/s/ D. Freeman Hutton, Esq.

/s/ Gilbert H. Deitch, Esq.

Robert Eugene Smith, Esq.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 7th day of December, 1972.

/s/ D. Freeman Hutton, Esq.

OPINION AND ORDER

Printed in JURISDICTIONAL STATEMENT
A-1 through A-17 inclusive
(Filed May 19, 1973)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1557

ALVIS G. SPEIGHT, t/a HAREM BOOK STORE, and JAMES L. CHANDLER,
Appellants,

v.

LEWIS R. SLATON, In his capacity as District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, In his capacity as Solicitor, Criminal Court of Fulton County,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

ALVIS G. SPEIGHT, t/a HAREM BOOK STORE, and JAMES L. CHANDLER,
Appellants,

v.

LEWIS R. SLATON, In his capacity as District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, In his capacity as Solicitor, Criminal Court of Fulton County,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Northern District of Georgia, Atlanta

Division, entered on February 22, 1973, denying Appellants' application for preliminary and permanent injunction and dismissing the Complaint and Petition for Injunction and Declaratory Judgment, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW

The opinion of the District Court for the Northern District of Georgia, Atlanta Division, is not yet reported. A copy of the Opinion and Order of the three-judge court by District Judge Moye; of the concurring opinion of District Judge O'Kelley; and of the dissenting opinion of Circuit Judge Morgan are attached hereto as Appendix A.

JURISDICTION

This suit was brought pursuant to 28 U.S.C. § 1343(3) based on a cause of action under 42 U.S.C. § 1983. A three-judge court was requested to be convened pursuant to 28 U.S.C. §§2281 and 2284 to enjoin the use by Appellees of certain Georgia statues as unconstitutional. The Opinion and Order of the three-judge district court was entered on February 22, 1973. Notice of appeal was filed in that court on March 26, 1973. The Notice of Appeal is attached hereto as Appendix B. The jurisdiction of the Supreme Court to review the decision of the district court by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

QUESTIONS PRESENTED

Whether the *Younger v. Harris*, 401 U.S. 37 (1971) and *Samuels v. Machell*, 401 U.S. 66 (1971) requirements for injunctive and declaratory relief were correctly applied where there was no criminal proceeding pending in the state court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of Ga. Code Ann. §§26-2101 (Ga.L. 1968, pp. 1249, 1302; 1971, p. 344), 26-2103 (Ga.L. 1971, pp. 344, 345), and 26-2104 (Ga.L. 1971, pp. 344-345) and Title 72, Georgia Code of 1933, as amended, are attached hereto, along with pertinent provisions of the First, Fifth and Fourteenth Amendments to the Constitution of the United States as Appendix C.

STATEMENT

On August 21, 1972, Appellees instituted an action in the Superior Court of Fulton County, Georgia, seeking to obtain temporary and permanent injunctions against the conduct and operation of the Harem Book Store in and on the premises at No. 2979 Campbellton Road, S.W., Atlanta, Georgia, by any person and an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed. A Rule Nisi was issued requiring Appellants to show cause before his Honor, Judge Claude D. Shaw, at 9:30 a.m. on August 25, 1972, then and there to be heard, why the prayers of the complaint should not be granted.

On the date set for hearing a removal action was filed in the United States District Court for the Northern District of Georgia thereby divesting the Fulton Superior Court of jurisdiction. Subsequently, Appellants filed the instant complaint for preliminary and permanent injunctions against the further use of Ga. Code Ann. §§26-2101 (Ga.L. 1968, pp. 1249, 1302; 1971, p. 344), 26-2103 (Ga.L. 1971, pp. 344, 345) and 26-2104 (Ga.L. 1971, pp. 344-345) as well as Georgia's Nuisance statutes, Title 72, Georgia Code of 1933, as amended, and declaratory judgments as to their unconstitutionality as written and as applied or threatened to be applied against Appellants. The requisite three-judge court was requested pursuant to 28 U.S.C. §§2281 and 2284.

The single District Judge to whom the case was referred stayed his ruling on the Appellees' motion to remand in the removal action pending a decision by the three-judge panel.

The Appellees sought to utilize a Georgia statute, Ga. Code Ann. §26-2103, which declared that the use of any premises in violation of any of the provisions of Chapter 26-21 of the Criminal Code of Georgia shall constitute a public nuisance. Chapter 26-21 is the portion of the Georgia Code dealing with the distribution of obscene materials. Georgia Code Ann. §26-2104 was also invoked by Appellees. That section declares that any materials declared to be obscene by the provisions of Chapter 26-21 and advertisements for such materials are contraband.

The statutory provisions of Ga. Code Ann. §26-2101 were attacked by Appellants as being unconstitutional on vagueness and overbreadth grounds and because they did not limit prosecutions to the sale of materials without notice to

the public of their nature or without reasonable protection against exposure of the materials to juveniles. *Cf. Alexander v. Virginia*, certiorari granted, 408 U.S. 921 (1972), argument heard October 19, 1972, and *Paris Adult Theater v. Slaton*, certiorari granted 408 U.S. 921 (1972), argument heard October 19, 1972.

Georgia Code Ann. §26-2103 and Title 72 of the Georgia Code of 1933 as amended, were challenged as being unconstitutional as written and as applied because they authorize a prior restraint on materials which are presumptively protected under the First Amendment of a kind condemned by the Supreme Court in an unbroken line of cases beginning with *Near v. Minnesota*, 283 U.S. 697 (1931) and continuing through *New York Times Co. v. United States*, 403 U.S. 713 (1971) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) and others. Georgia Code Ann. §26-2103 was also attacked as denying due process and equal protection in that the statute makes a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of a single, isolated transaction as to only one of possibly thousands of presumptively protected publications and materials without any showing of traditional elements necessary to constitute a continuing public nuisance. This labelling of a business as a public nuisance on the basis of a single isolated transaction was also attacked as creating an invalid presumption of the type condemned by the United States Supreme Court in *Leary v. United States*, 395 U.S. 1532. It was further attacked as denying Fifth and Fourteenth Amendment rights to have every element making up a nuisance to be proven by competent evidence, in a First Amendment context, beyond a reasonable doubt.

The state court action was brought by the District Attorney of the Atlanta Judicial Circuit pursuant to authority granted him in Title 72, Georgia Code of 1933 to institute proceedings to abate a continuing public nuisance. The Solicitor of the Criminal Court of Fulton County joined the state court action as a plaintiff and is an Appellee herein even though no statutory or other authority exists for the Solicitor to act for the public to abate a nuisance.

The Harem Book Store, operated by Appellant Speight on premises leased to Appellant Chandler, is located at 2979 Campbellton Road, S.W., Atlanta, Georgia, on property zoned C-2 commercial; a classification which includes a retail bookstore. The Harem Book Store is engaged in the sale and offering for sale of books, magazines, newspapers, movie films, and other materials which are presumptively protected under the First Amendment to the Constitution of the United States, pursuant to applicable City of Atlanta business licenses.

The publications offered for sale by the Harem Book Store are comparable to those declared not to be obscene by the Supreme Court and many inferior Federal Courts, as well as state appellate courts, and hence, are protected expression under the First Amendment to the United States Constitution. No sales or offerings are made to persons under eighteen years of age (minor) of any of the adult-type publications or materials distributed by the Harem Book Store, nor are they "pandered" in the Ginzburg-sense, nor are the materials sold in such a way that unwilling persons cannot avoid them.

No persons have been convicted for distributing obscene materials upon the premises of the Harem Book Store. The trial of one employee on such charges resulted in a mistrial when the jury was unable to reach a verdict. No publication sold or offered for sale at the Harem Book Store has been adjudicated obscene.

At the hearing on Appellants' Motion for a Preliminary and Permanent Injunction several publications which had been purchased by adult agents of the Solicitor's office were tendered into evidence and were ruled inadmissible. Some of these were those upon which a conviction could not be obtained in the earlier criminal prosecution.

The three-judge panel produced three opinions. The two District Judges rules that the propriety of federal intervention in these circumstances has been decided by the Fifth Circuit Court of Appeals in *Palio v. McAuliffe*, 466 F.2d 1230 (5th Cir. 1972) and therefore, since the state court action was not brought in bad faith[1] or for purposes of harassment and Appellants did not present any "special circumstances which would justify federal intervention," the complaint must be dismissed. The concurring opinion of District Judge O'Kelley stated that, in order for the federal court to intervene, there must be no adequate remedy or appellate process in the state courts.

---

[1] Bad faith was alleged by Appellants and facts supporting that allegation were presented. Paragraphs 18 through 20 of the Complaint read as follows:

"18.

Defendants knew or should have known that no violation of Georgia statutes, to-wit: Georgia Code §26-2101, has been

Circuit Judge Morgan dissented, having found the statutes herein involved susceptible to no saving construction and

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(Footnote 1 Continued)

alleged and proved in any court of law against Plaintiffs herein, or any of their agents, servants, and employees, relating to the Harem Book Store located at 2979 Campbellton Road, S.W., Atlanta, Fulton County, Georgia, prior to the institution of the Complaint attached hereto and identified as Exhibit 'A'.

"Further, Plaintiffs, affirm that in a criminal prosecution charging Plaintiff James L. Chandler, brought in the Criminal Court of Fulton County, by the agents, servants, and employees of Defendant McAuliffe charging violation of State of Georgia Obscenity law, after a trial of three (3) days, a mistrial was declared by the Honorable Daniel Duke, Judge, because the jury was unable to reach a unanimous verdict. (The jury remained in deadlock at four (4) to one (1) in favor of acquittal.)

"19.

The resort to utilization of the concept of public nuisance authorized by Georgia Statutes by the Defendants in order to shut down the Harem Book Store and forbid press materials to be sold there as well as seeking the forfeiture and destruction of all the press materials contemporaneously being offered for sale at said store, without regard to whether or not each and every single publication can be said to be obscene in the constitutional sense, and indeed, the said Complaint, as sanctified by verification, states, in part, as follows:

> 'Said books, magazines and motion picture films and said imitation penises and phallic objects constitute one stock of merchandise all of which is pandered as being in the nature of hard-core pornography and the major portion or a substantial portion of such stock of merchandise is such hard-core pornography, and plaintiffs say that the entire stock of merchandise is accordingly subject to condemnation and forfeiture.' (Exhibit "A", p. 3)

and rejecting the "civil proceeding used to enforce criminal laws" rationale of *Palaio v. McAuliffe*, supra.

The majority of the three-judge court finding that *Younger v. Harris*, 401 U.S. 37 (1971) and its companion cases,[2] as interpreted by the Fifth Circuit in *Palaio v. McAuliffe, supra*, required non-intervention, the action was dismissed and this appeal follows.

THE QUESTION IS SUBSTANTIAL

The question presented herein is virtually identical with that presented in *Steffel v. Thompson*, No. 72-5581, certiorari

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(Footnote 1 Continued)
Further, Defendants also, by their proceedings in enforcement of said Georgia Statutes, attempt to circumvent the safeguards of the criminal process with its requirement of proof beyond a reasonable doubt before a jury and substitute therefore a lesser, civil, burden of proof, to-wit: the preponderance of the evidence standard, and a judge.

"20.

Said attempt is, in truth and fact, a bad faith effort to force the cessation of sales of all materials in the said store without regard to whether constitutionally protected. (See paragraph 4 of the Complaint attached as Exhibit "A".)"

[2] *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 79 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971).

granted, February 26, 1973. It raises important issues regarding whether a showing of irreparable injury or other extraordinary circumstances is required in order for a federal court to grant injunctive and declaratory relief in cases which involve a pending state civil proceeding but do not pose a threat to state criminal prosecutions. This question was not decided by *Younger v. Harris, supra,* which itself dealt with a criminal case. Mr. Justice Black wrote,

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. 41.

The concurring opinion of Mr. Justice Steward in *Younger v. Harris,* 401 U.S. at 55, in which Mr. Justice Harlan joined, makes clear the limited nature of the holding in that case:

> "... [s]ince all these cases involve state criminal prosecutions, we do not deal with the considerations which should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently."

However, the majority of the three-judge court, while recognizing explicitly the fact that *Younger v. Harris, supra,* and its companion cases did not decide the issue, felt bound by *Palaio v. McAuliffe,* 466 F.2d 1230 (5th Cir. 1972) and the following language therein:

> "We believe, however, that application of the principles of *Younger* should not depend upon such labels as 'civil' or 'criminal', but rather should be

governed by analysis of the competing interests that each case presents (and) when federal anticipatory relief will significantly affect a state's enforcement–by whatever means–of its criminal laws, then such relief is barred by the strong policy of noninterference, unless the plaintiff can meet the heavy burden of proof that *Younger* imposes."

"We thus pose a limited answer to the question expressly reserved in *Younger, supra,* by holding that, *where plaintiff is unable to prove the existence of 'special circumstances,' the principles of Younger bar federal intervention in a state civil proceeding that is an integral part of a state's enforcement of its criminal laws.*"

1. *Palaio v. McAuliffe, supra,* is incorrect in its reasoning and its holding, and, in any event, is not applicable to the present case. In that case, the Solicitor General of the Criminal Court of Fulton County, Georgia, instituted proceedings in the Fulton County Superior Court to have two named motion pictures declared obscene and subject to seizure. Shortly before the date set for the state court hearing Palaio and others filed complaints in federal district court seeking injunctions against pending and future criminal and civil proceedings against them and a declaration that the procedures employed in the state court suit were constitutionally invalid. On March 17, 1971, after the state judge had found probable cause for declaring one of the motion picture films obscene and after the state criminal prosecution of the appellants in *Palaio v. McAuliffe, supra,* had begun, the federal district judge concluded that the suit to declare the motion pictures subject to seizure was a good-faith effort by Georgia officials to enforce Georgia criminal laws, and accordingly held that dismissal was dictated by *Younger v. Harris, supra.*

By the time the appeal reached the Court of Appeals the criminal prosecution was pending and the Fulton Superior Court had been affirmed by the Supreme Court of Georgia on October 7, 1971, in *1024 Peachtree Corp. v. Slaton*, 228 Ga. 102, 184 S.E.2d 144.

The Court of Appeals agreed with the characterization by the Supreme Court of Georgia of the suit to declare the film subject to seizure as a part of Georgia's program of enforcing its criminal laws. It pointed out that a three-judge federal court has suggested such suits might afford a method of obtaining the constitutionally required adversary hearing prior to the arrest and prosecution of one for the sale of allegedly obscene materials. *Gable v. Jenkins*, N.D. Ga. 1969, 309 F.Supp. 998, aff'd. per curiam, 397 U.S. 592 (1970). This ignores the compulsory self-incrimination aspects of such a proceeding which forces one to furnish a film to the court as the beginning of a prosecution for exhibiting that same film.

The Court of Appeals also relied upon language by the Supreme Court in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 437 (1957) recognizing that such civil suits "supplement the existing conventional criminal provisions dealing with pornography." However, the quoted portion did not refer to "such civil suits." Instead, it referred to §22-a of the New York Code of Criminal Procedure (L. 1941, C. 925), as amended in 1954 (L. 1954, C. 702). Unlike New York, Georgia has no civil statutes dealing with obscenity. Section 22-a of the New York Code of Criminal Procedure was upheld because it did have procedural safeguards. The Georgia procedure has none and is presently under review by this court in *Paris Adult Theatre v. Slaton*, No. 71-1051, certiorari granted 408 U.S. 921, argument heard, October 19, 1972.

In a case similar to this one, decided after *Younger v. Harris, supra,* and its companions, this Court ruled that 42 U.S.C. §1983 is an exception to the Anti-Injunction Statute, 28 U.S.C. §2283, *Mitchum v. Foster,* 407 U.S. 225 (1972). The dissent of Chief Justice Burger, in which Justices White and Blackman joined, urged the district court on remand to consider

> "whether general notions of equity or principles of federalism similar to those invoked in Younger, prevent the issuance of an injunction against the state 'nuisance abatement' proceedings in the circumstances of this case." *Id.* at 244.

The majority of the three-judge court cited the above language but it is doubtful that this court would have reached the 42 U.S.C. §1983 issue, after its ruling in *Younger,* had it not thought intervention might be appropriate if the Anti-Injunction statute did not present an absolute bar.

As pointed out by Circuit Judge Morgan, in his dissent, civil proceedings result in the loss of certain protections which are available in a criminal proceeding. Among these are trial by jury and proof beyond a reasonable doubt, to name but two.

Assuming, *arguendo,* that the "civil as basically an enforcement of criminal law" theory of *Palaio, supra,* is correct, that is not the case here. While all the materials proffered by the state into evidence are or have at one time been the basis of criminal prosecutions against individuals, the disposition of the instant case will not, in the words of *Palaio, supra,* "significantly affect a state's enforcement–by whatever means–of its criminal laws." 466 F.2d 1230 at 1233. The

pending criminal prosecutions will remain pending no matter what the disposition of this case. The instant case cannot be characterized as civil enforcement of criminal laws because the relief requested by Appellees is not authorized by either civil or criminal or statutory or case law. Appellees' complaint requested the following:

> "(a) . . . injunctions, both temporary and permanent, against the conduct and operation of the Harem Bookstore . . . by any person; and
>
> "b" . . . an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with the advertising, sale and exhibition for sale of said merchandise, to be contraband and to be forfeited and destroyed."

That this is an impermissible prior restraint of constitutionally protected materials is obvious and will be discussed hereinafter. Here, however, its inclusion is to show that what is being sought here is qualitatively and substantively different from what took place in *Palaio, supra,* and, *Palaio* is not controlling.

2. The decision of the three-judge district court is in conflict with the decision of this Court in *Lake Carriers Association v. MacMullan,* 406 U.S. 498 (1972) in which it was held that abstention was not required by *Younger v. Harris, supra,* and its progeny in an action for injunctive and declaratory relief against the enforcement of the Water Pollution Control Act of the State of Michigan. The statute provided,*inter alia,* that a violation of its provisions would be punished as a criminal misdemeanor. 406 U.S. 498 at_____. The three-judge court involved there held that the complaint failed to state a justiciable controversy and that compelling reasons justified federal abstention.

This Court found a justiciable controversy but that abstention was appropriate. However, all but one of the District Court's grounds for abstention were rejected. This Court held that abstention was appropriate because the state court could settle the question of a correct construction of the new act, and possibly avoid the federal question once federal regulations were promulgated.

To reach that decision this Court was compelled to consider the implications of *Younger v. Harris* and *Samuels v. Mackell*. Mr. Justice Brennan found that the stringent post-prosecution tests are inapplicable to a case in which there was no criminal prosecution which was to be enjoined:

> In *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), this Court, held that, apart from 'extraordinary circumstances,' a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on consideration of equity practice and comity in our federal aystem that have little force in the absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction is appropriate if the conditions for declaratory or injunctive relief are met. See generally *Perez v. Ledesma*, 401 U.S. 82, 93 (1971) (separate opinion)." 406 U.S. 498, at _____

The separate opinion referred to in that of Mr. Justice Brennan himself. Since this Court has held that the stringent *Younger v. Harris* and *Samuels v. Machell* tests do not apply in a suit prior to or not involving criminal prosecutions then the decision of the District Court in this case conflicts with *Lake Carriers Assoc. v. MacMullan, supra*.

3. The decision appealed from is in conflict with the principles enunciated by this Court in *Gibson v. Berryhill*, 41 L.W. 4576 (5-7-73). In that case, Berryhill and others were licensed optometrists employed by Lee Optical Co. and were not members of the Alabama Optometric Association because membership therein was limited to optometrists practicing privately. They were charged by the Association with unprofessional conduct within the meaning of the state optometry statute because of their employment with the company. The complaint was filed with the Alabama Board of Optometry (board) all members of which were Association members. Two days thereafter the Board brought its own suit in state court against the optometrists and their employer, Lee Optical, to enjoin the company from practicing optometry. The action before the Board was stayed pending the outcome of the state court action. The charges against the individual defendants were dismissed but the state trial court enjoined Lee Optical from engaging in the practice of optometry. The company appealed. The Board, in the meantime, revived the Association's charges against Berryhill and the other appellees, who sought an injunction in the Federal District Court under the Civil Rights Act claiming that the Board was biased. The District Court enjoined the Board proceedings but thereafter the State's highest court reversed the state trial court and held that the optometry law did not prohibit a lecensed optometrist from working for a corporation. Thereafter, the Board appealed to the Supreme Court. This Court held that neither the rule of *Younger v. Harris*, 401 U.S. 37 or principles of comity required the District Courts to dismiss the suit in view of the pending Board proceedings. The reasoning that compelled the conclusion that intervention was proper despite the pending

actions is applicable here.

This Court unanimously held that the predicate for a *Younger v. Harris* dismissal is "the opportunity to raise and have timely decided by a competent state tribunal the federal issued involved." 41 L.W. 4580. A competent tribunal was not present in *Gibson v. Berryhill* because the State Board of Optometry was incompetent by reason of bias to adjudicate the issues before it. 41 L.W. 4581.

The remaining predicate for a *Younger v. Harris* dismissal – the opportunity to raise and *have timely decided* the federal issues involved – is not present.

There are absolutely no procedural safeguards surrounding the civil adjudication of materials as obscene in Georgia. This Court has before it, in *Paris Adult Theatre v. Slaton*, No. 71-1051, certiorari granted, 408 U.S. 921, argument heard October 19, 1972, a challenge to *ad hoc* procedures of the State of Georgia relating to obscenity.

A Florida statute authorizing the suppression of materials as obscene on nuisance grounds has been invalidated by a three-judge court because it lacked the procedural safeguards this Court has required. *Meyer v. Austin*, 319 F.Supp. 457 (1970), appeal pending *sub nom. Austin v. Meyer*, No. 70-35, stay vacated June 26, 1972, _____ U.S. _____. Specifically, Appellants herein are not entitled to a prompt decision by either case or statute law in Georgia. The issues do not need to be "timely decided." The trial court can take its time but even after a decision by it the appellate courts of Georgia are not required to rule within any given time. This is contrary to the holdings of this Court in *Freedman v. Maryland*, 380 U.S. 51; *Blount v. Rizzi*, 400 U.S. 410; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957) and others.

Under Georgia law injunction cases are exempt from the automatic supersedeas provisions of §8 of the Appellate Practice Act of 1965. The burden rests upon the appellant to obtain such order, pursuant to §62(c) of the Civil Practice Act (Georgia Code Ann. §81A-162(c)) to obtain such order as will protect his rights and preserve the status quo during the pendency of the appeal. *Howard v. Smith*, 226 Ga. 850 (1970). The provision of the Civil Practice Act referred to above provides, in pertinent part, that when an appeal is taken from an interlocutory or final judgment granting an injunction, the court in its discretion may suspend the injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. §81A-162(c).

This means that a prior restraint either in the form of a bond "or otherwise" or closure of the bookstore pending appeal is expressly authorized by Georgia law pending an appeal. Equally obvious is the potentially prohibitive cost of an appeal and the resulting tendency to self-censorship lest an entire business be lost because one volume of a book or one issue of a magazine may trigger nuisance abatement proceedings. *Cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

Because of the above facts irreparable harm would be present in letting the state court adjudicate the issues involved in the instant case as surely as it was present in *Gibson v. Berryhill, supra*, in which the tribunal was incompetent because of bias.

4. The decision of the three-judge district court is in conflict with the result of the decision of a three-judge court

in the Western Division of the United States District Court for the Northern District of Ohio in *Pursue, Ltd. v. Huffman,* _____ F. Supp. _____ No. C 72-432, decided April 20, 1973. In that case a suit was brought under 42 U.S.C. §1983 seeking injunctive relief and declaratory judgment against the assertedly unconstitutional provisions of the Ohio nuisance statute, O.R.C. §§3767.01, et seq., as it pertains to the exhibition of obscene movies. Huffman, Prosecutor of Allen County, Ohio, filed a civil complaint seeking a temporary and permanent injunction closing the Cinema I Theatre in Lima, Ohio, on the grounds that obscene movies were being shown therein in violation of applicable statutes. After a hearing on Huffman's motion for a temporary injunction the Court entered an order closing the theatre for an indefinite period. A complaint was filed in the district court and the district court stayed the state court injunction, but only to the extent that that injunction forbade the showing of films which had not been held to be obscene in a prior adversary hearing.

Thereafter, Huffman applied for a hearing for the purpose of conducting a prior adversary hearing on films not yet reviewed and to consider his application for a permanent injunction against the theatre. The Court ordered the theater closed for one year unless released by order of the Court pursuant to compliance by the owners of the theater with certain statutory requirements.

Pursue, Litd., as successor in interest of the original leaseholder, filed a complaint in the district court seeking a temporary restraining order and preliminary and permanent injunctive relief against the state court judgment and declaratory judgment respecting the asserted unconstitutionality of the Ohio statute. Without even discussing

the issues of abstention or comity the three-judge court asserted jurisdiction and held the Ohio statute to be an impermissible prior restraint on First Amendment rights and therefore unconstitutional. Obviously, as did Circuit Judge Morgan in the instant case, that panel had no difficulty in finding irreparable harm in the closing of the place of business.

5. There is no remedy available to Appellants in the state courts of Georgia. The majority opinion points out that "plaintiff consistently responded at the three-judge hearing that he could raise the same issues of constitutionality in the Georgia state courts." This is true. It is also true that the decisions of the Supreme Court of Georgia have already approved the use of the public nuisance approach to the regulation of "obscene" materials. In *Evans Theatre Corporation v. Slaton,* 227 Ga. 377 (1971) the Supreme Court of Georgia held that

> "the State has an interest in the welfare, peace and good order of its citizens and communities, and that an action may be maintained at the instance of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws." 227 Ga. 377 at 382.

See also, *Paris Adult Theatre v. Slaton,* 228 Ga. 343 (1971), certiorari granted, 408 U.S. 921 and argument heard October 19, 1972, and *Walter v. Slaton,* 227 Ga. 676 (1971). The decision in *Evans Theatre Corporation v. Slaton, supra,* was prior to the passage of the legislation relied upon by the Appellees who admitted at oral argument that the challenged Code section was drafted with reliance upon that case. There is no reason to believe that the Supreme Court of Georgia will not authorize under a statute what it approved in the absence of one.

6. The substantive issue involved on the merits is of paramount importance and its resolution is necessary by this Court in view of the place occupied by the Free Speech and Press provisions of the First Amendment in a democracy. Moreover, the closing of a bookstore under the guise of abating a public nuisance is a constitutionally impermissible prior restraint and violates the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

Appellees Slaton and McAuliffe, in their Complaint to close the Harem Book Store as a public nuisance, made it quite clear that they do not seek merely the cessation of what they view as illegal activity on the premises (i.e., the possession, for sale, of obscene materials), but have asked for temporary and permanent injunctions against the conduct and operation of the Harem Book Store.

However, "a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).

> "The *First Amendment* requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line . . . Our insistence that regulations of obscenity scrupulously embody the most vigorous procedural safeguards . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks . . . '. *Bantam Books v. Sullivan*, 372 U.S. 58, 66 (1963)." *Blount v. Rizzi*, 400 U.S. 410, 416, 417 (1971).

Moreover, this Court has made it clear that since

> "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . [t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

Appellees Slaton and McAuliffe, under their planned use of the nuisance concept, do not plan to separate protected from unprotected speech; they merely seek to prevent all kinds of speech, at the Harem Book Store, by closing its doors forever by labelling it a public nuisance.

As did the system condemned in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this method of obscenity regulation conveniently makes recourse to the criminal process unnecessary.

"Any prior restraint on expression comes to [the Supreme Court] with a 'heavy presumption' against its constitutional validity. *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

In considering the validity of an injunction forbidding the distribution of "any literature" by the petitioners, the Supreme Court, in *Organization for a Better Austin v. Keefe*, noted that

> "in a case of this kind the courts do not concern themselves with the truth or validity of the

> publication. Under *Near v. Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on *First Amendment* rights. Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

The only difference between that case and the instant case is that the population of Atlanta and Fulton County is several times that of the City of Westchester, Illinois, the one referred to above and hence, a far greater number of people will be deprived of access to materials which are presumptively protected by the *First* and *Fourteenth Amendments* to the *Constitution of the United States.*

The proposed injunction, it should be noted, does not enjoin the sale or distribution of "obscene" materials; instead, by closing the store, it enjoins the sale of any materials whether obscene or otherwise. The Court of Appeals for the Fourth Circuit has recently recognized that

> "the Supreme Court has made it clear that laws which regulate activities protected by the First Amendment must be more than merely rational, and are not accorded the presumption of constitutionality normally accorded to acts of the legislature. *United States v. Congress of Industrial Organization*, 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948)." *United States v. Crowthers*, 456 F.2d 1074, 1080.

The Court went on to hold that to abridge activities protected by the *First Amendment*,

> "the government must have a compelling interest to justify the abridgment and the scope of the abridgment must not be greater than reasonably necessary to serve the government's purpose. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945)." *United States v. Crowthers, supra*, at 1080.

The idea advanced above, sometimes referred to as the "less drastic means" doctrine, requires that

> "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purposes." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

The Fifth Circuit has noted that in the area of *First Amendment* freedoms,

> "the overbreadth doctrine plays an important role, for it requires the legislature to focus narrowly on the particular evils it wishes to combat when speech is at stake," *Hobbs v. Thompson*, 448 F.2d 456, 470 (1971).

In *Roth v. United States*, 354 U.S. 476, 488 (1957), the decision upholding the right to regulate obscenity, it was said:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being

> of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

The cases cited above make clear that the blunderbuss approach to the regulation of obscenity represented by declaring the premises or the store to be a nuisance (even assuming valid, final convictions for violation of obscenity statutes thereon in the past) cannot be made to conform to the standards of the *First, Fifth* and *Fourteenth Amendments.* First, there is an adequate remedy at law for violations which have occurred in the past, *i.e.*, the criminal penalty. Second, declaring the business to be a nuisance does not comport with the less drastic means test because it completely prevents the dissemination of even protected materials. Third, a lesser measure, an injunction against the dissemination of "obscene" materials, would operate as a prior restraint, would induce self-censorship, and would not give such notice as to what conduct was prohibited as to be enforceable. In addition, it would place the bookseller in the position of having to prove that he was not violating the injunction by proving the offending material is, in fact, protected. This is, of course, also contrary to established doctrine that the burden of proof is upon the censor. *Speiser v. Randall,* 357 U.S. 513 (1958). Fourth, there are no safeguards by which a judicial decision as

to whether the materials are, in fact, protected will be forthcoming within any stated period of time, thus ensuring a restraint of only such duration as is necessary for sound judicial resolution of the issues. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and *Blount v. Rizzi*, 400 U.S. 410 (1971).

The decision of the Supreme Court of the United States in *Near v. Minnesota*, 283 U.S. 697 (1931), makes very clear the vice of the Appellees proposed procedure against Appellants wherein it states, at page 713:

> "If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter – in particular that the matter consists of charges against public officers of official dereliction – and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship."

The same judgment, that the operation and effect is "the essence of censorship", is appropriate here.

In a later portion of the opinion, the Court answered the argument that the statute dealt not with publication *per se*, but with the business:

> "In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the 'business' of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constituional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made." *Near v. Minnesota, supra,* at 720.

In 1962, the Supreme Court had before it the case of *Manual Enterprises, Inc. v. Day*, 370 U.S. 478. That case concerned the proper construction of *18 U.S.C.* §*1461* and its application to the nude male magazines involved therein. The concurring opinion at 370 U.S. 503, 504 of Mr. Justice Brennan, speaking for himself, Mr. Chief Justice Warren, and Mr. Justice Douglas, dealt with the possible constructions of the statute, which dealt with regulation of obscenity through the mails:

"There are two possible constructions of §*1461* on the basis of this brief Senate discussion. One possibility is that short of breaking seals, the postmasters could remove matter which they thought from its face or the name of its sender to be obscene. The second construction is that postmasters could remove matter but only to turn it over to the appropriate authorities as the proposed subject of a criminal prosecution – and also of course after that material had been determined, in a criminal trial of its sender, to be obscene. Support for this second construction is found not only in the brief 1865 Senate consideration itself but also in an 1888 statute amending §*1461*, and enacting a second banning material with obscene matter on its face and – unlike §*1461* – explicitly providing that it 'shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe.'

"The 1865 Senate discussion is not unambiguous, but I cannot suppose that Senator Johnson – who had already noted his awareness that much obscene material was discoverable without breaking seals, and even so, his determined opposition to its being stopped – would have accepted Senator Sherman's suggestion had he understood it to mean more than that the Post Office could stop obviously questionable matter for the purpose of transmitting it to prosecuting authorities, could stop matter already held obscene if it were sent again, and could investigate matter sent by persons previously convicted and, if the matter were found violative, could present it to the prosecuting authorities. I believe this is the correct construction of the 1865 enactment. But at least *it is arguably correct, and necessary if we are to avoid the section's probable constitutional infirmity (see Near v. Minnesota, 283 U.S. 697, 75 L.Ed. 2d 1357, 51 S.Ct. 625;*

Summerfield v. Sunshine Book Co., 95 App.D.C. 169, 221 F.2d 42) if construed as a provision allowing the Postmaster General to exclude all matter sent by a person who had previously sent violative matter." (Emphasis supplied.)

This reasoning compels the conclusion that not only may materials not be proscribed which have not been judicially found obscene, but also that even assuming that a valid conviction has been obtained as a result of the sale of obscene material at a given location, it is not constitutionally permissible to put a blanket prohibition on further sales of any materials.

The validity of the reasoning and approach of the Supreme Court in *Near* is more apparent now than ever before. The Appellants herein who have not ever proven violations of the law arising out of the business of the subject bookstore are engaged, purely and simply, in attempted censorship and suppression of materials which they cannot establish are unlawful, but which they personally find offensive. This Court, charged as it is with the duty of preventing erosions of those fundamental freedoms which set this country apart from all others, should not countenance such tactics.

Case law involving the suppression or attempted suppression of allegedly obscene materials on nuisance grounds is scant and not uniformly consistent. Nevertheless, the better reasoned opinions prohibit the kind of relief sought by the Appellees in their action.

The most recent case, and one directly in point on the merits, is *Pursue, Ltd. v. Huffman,* _____ F. Supp. _____

(No. C72-432, U.S.D.C.N.D. Ohio, decided April 20, 1973), discussed above. In that action a permanent injunction was issued against the enforcement of a state court order closing an Ohio theatre as a nuisance pursuant to an Ohio statute. The decision held that the statute and its application to the theatre constituted an overly broad prior restraint upon First Amendment rights.

Several state courts have reached the same conclusion. In *New Riviera Art Theatre v. State*, 412 S.W. 2d 890 (Tenn. 1967), the Supreme Court of Tennessee construed a statute under which the District Attorney General of the Sixth Judicial District of Tennessee sought a temporary injunction enjoining the Defendants from showing or disposing of a film entitled "London Night Life" or other such film, or acquiring such other films. A permanent injunction was prayed for, after a hearing, and a determination the films complained of were obscene.

After a hearing, the Trial Court found certain named films to be obscene and decreed, at 892:

> "It is, therefore, ordered, adjudged and decreed, pursuant to the authority in Tennessee Code Annotated, Section 39-3005 (c) that the defendants, New Rivieria Art Theatre of Chattanooga, Inc., and H. W. Hill, be permanently enjoined from the further or future showing of the films and 'Coming Attractions' or 'Trailers' of the sort, kind or type which may be classified by the court as 'obscene material' under the definition of Tennessee Code Annotated, Section 39-3007."

The Appellants insisted first, that the statute in question did not authorize the granting of an injunction, temporary or

permanent, enjoining the showing of any and all films by the parties sought to be enjoined. The Court agreed, stating that the statute comprehended injunctions only against obscene material and added, at 412 S.W. 2d 893, 894, the following:

> "The granting of a temporary injunction prohibiting the defendants from showing any film had the effect of closing the theatre and was an unconstitutional application of the statute in violation of defendants' constitutional rights of freedom of speech and due process."

The Appellants also complained about the permanent injunction prohibiting defendants from showing other films and coming attractions or trailers of the sort, kind or type which may be classified by the Courts as obscene material.

The Court agreed:

> "The statute does not authorize an injunction to restrain the acquisition and display of unidentified films, coming attractions or trailers which a court might in the future hold to be obscene. Such a construction of the statute would vest in the courts an unlimited power of prior restraint on the freedom of speech and press.
>
> "Such an interpretation would also place the burden upon the defendants of determining whether any film they might acquire might be classified by the court as obscene material."
>
> "The burden is on the District Attorney General to show the material sought to be enjoined from sale or display is unprotected by the first amendment to the constitution of the United States. *Freedman v. State of Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965).

> "We agree this portion of the decree is obviously in violation of the first, fifth and fourteenth amendments to the Federal Constitution. *Kingsley Books, Inc. v. Brown, supra.*" *New Rivieria Art Theatre v. State, supra,* at 895.

The Supreme Court of Florida, in *Mitchum v. Florida ex rel Schaub,* 250 So.2d 883 (1971), had occasion to consider a Trial Court's permanent injunction which was worded as follows:

> "ORDERED AND ADJUDGED that the Respondents cease and desist from selling, offering for sale or causing to be sold or offered for sale obscene or pornographic publications in violation of F.S.A. 847.011 . . . "

The Court condemned this order succintly and directly:

> "The 14th Amendment of the United States Constitution requires that regulation of obscenity conform to procedures that will insure against the curtailment of constitutionally protected expression or publication. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). The operation and effect of the method by which sale of publications is to be restrained must be very carefully defined. Cf. *Speiser v. Randall,* 357 U.S. 513 (1958). We are of the view that a blanket injunction is constitutionally invalid because it does not put the seller on notice as to what is prohibited, and thereby creates an unacceptable restraint upon hisfreedom to vend publications. Cf. *Smith v. California,* 361 U.S. 147 (1959); *Freedman v. State of Maryland,* 380 U.S. 51 (1965). See, *New Riviera Art Theatre v. State,* 412 S.W. 2d 890 (Tenn. 1967)."

The Florida Court went on to note that a permanent injunction, reading as follows, had been entered by the Trial Court:

> "ORDERED AND ADJUDGED that the operation of the Adult Book and Movie Store at 1437 Main Street in the City of Sarasota, Florida, by said respondents constitutes the maintaining of a public nuisance and Matthew Rocks and Bob Mitchum are hereby enjoined from the further operation of or maintenance of said business premises so as to annoy the community and to become manifestly injurious to the morals or manners of the people."

This, too, was found to be unacceptable.

> "This injunction is also invalid. A business involved in the dissemination of publications cannot be declared a nuisance in this manner. See *Near v. Minnesota ex rel. Olson,* 283 U.S. 697 (1931)."

The Florida Court also pointed out that the procedure utilized by the State of Florida to condemn the entire contents of the bookstore was deficient. Three exhibits had been presented to the Trial Court and were used to condemn the entire contents of the bookstore on the theory that they were "representative".

The Court rejected this approach:

> "Unless a defendant is willing to stipulate that particular exhibits are absolutely representative of the stock offered the public, one copy of each item sought to be suppressed must be entered into evidence." *Mitchum v. Florida ex re. Schaub, supra.*

In rejecting the contention that one publication might be used to judge others not in evidence, the Court relied upon the Supreme Court's decision in *Marcus v. Search Warrant*, 367 U.S. 717 (1961). In that case, Missouri procedures for suppressing alleged obscenity were found to lack the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. The Court discussed the reliance by the Missouri Supreme Court on the Supreme Court's decision in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and found such reliance to be misplaced:

> "The differences in the procedures under the New York statute upheld in that case and the Missouri procedures as applied here are marked. They amount to the distinction between 'a "limited injunctive remedy," under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene,' *Kingsley Books, supra* (354 U.S. at 437), and a scheme which in operation inhibited the circulation of publications indiscriminately because of the absence of any such safeguards. *First*, the New York injunctive proceeding was initiated by a complaint filed with the court which charged that a particular named obscene publication had been displayed, and to which were annexed copies of the publication alleged to be obscene. The court, in restraining distribution pending final judicial determination of the claim, thus had the allegedly obscene material before it and could exercise an independent check on the judgment of the prosecuting authority at a point before any restraint took place. *Second*, the restraints in *Kingsley Books*, both temporary and permanent, ran only against the named publication; no catchall restraint against the distribution of all 'obscene'

> material was imposed on the defendants there, comparable to the warrants here which authorized a mass seizure and the removal of a broad range of items from circulation."

At this point, Footnote 28 was referred to and it cites the refusal of the Trial Court in *Kingsley Books, supra,* to allow the Defendants therein to do as the Appellees wish to do in their proceeding against Harem Book Store:

> "28. The trial judge in *Kingsley Books* refused to enjoin the distribution of future issues of the publication in question, stating: '[u]nless the work be before the court at the time of the hearing at which the injunction is sought, it is inappropriate to make a judicial determination with respect to it. In respect of this feature of the case, the plaintiff seeks a likely trespass upon a constitutionally protected area, and the court must reject that prayer.' 208 Misc. 150, 168, 169, 142 NYS 2d 735, 751. Cf. *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 51 S.Ct. 625." *Marcus v. Search Warrant, supra,* at 735.

Thereafter, the Court pointed out other differences between the procedure in *Kingsley Books, Inc. v. Brown, supra,* and the Missouri procedure which are also relevant to the Georgia procedure:

> "*Third, Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene. This Court expressly noted there that the State was not attempting to punish the distributors for disobedience of any interim order entered before hearing. The Court pointed out that

> New York might well construe its own law as not imposing any punishment for violation of an interim order were the book found not obscene after due trial. 354 U.S. at 443, note 2. But there is no doubt that an effective restraint – indeed the most effective restraint possible – was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor." *Marcus v. Search Warrant, supra,* at 735, 7356.

More recent cases have been consistent with the theory espoused by Appellees herein. In *State of Indiana ex rel Thomas J. Blee v. Mohney Enterprises, et al.*, 289 N.E. 2d 519 (Court of Appeals of Indiana), Petition to Transfer to the Supreme Court of Indiana denied May 14, 1973, the approach of Appellees Slaton and McAuliffe herein was rejected by the highest Courts of Indiana. In that case Blee had sought to enjoin the operation of an adult bookstore, operated by Mohney, as a nuisance. The trial court found for Mohney and Blee, on behalf of the State of Indiana, appealed.

Blee had contended that an Indiana statute deeming any building or place used for the purpose of lewdness, assignation or prostitution a nuisance applied to the operation of a retail bookstore selling allegedly obscene materials. He also had alleged that such operation constitutes a public nuisance enjoinable by a private citizen under I.C. 1971, 34-1-52-1; Ind. Ann. Stat. §2-505 (Burns 1967) which reads:

> "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the

> comfortable enjoyment of life or property, is a nuisance, and the subject of an action."

Blee introduced into evidence several exhibits consisting of materials he and others had purchased at the bookstore. The Court, as had the trial court, did not pass on the contention that these materials were obscene.

The Court pointed out that what Blee sought to enjoin "is the dissemination by an adult bookstore, of *any* printed materials whatsoever, in Allen County" and that he did not seek to prohibit only the dissemination of specific, identifiable items.

The Court stated that any discussion of the issues tendered by Blee must be preceded by a determination whether such injunctive relief would be violation of the First Amendment to the Constitution of the United States.

After quoting *Roth v. United States*, 354 U.S. 476 (1957) and *Redrup v. New York*, 386 U.S. 767 (1967), the Court stated:

> "None of the above standards is broad enough to prohibit dissemination of materials which have not yet been printed.
>
> This decision must rest upon the firmly established principle reiterated in *Organization for a Better Austin v. Keefe* (1971), 402 U.S. 415, that an "injunction, so far as it imposes prior restraint on First Amendment rights." [And it is impermissible where it] operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature of 'any kind' . . . "

The requested injunction would be an impermissible prior restraint and the trial court's denial thereof was proper. We therefore do not reach appellant's other contentions.

Judgment affirmed."

Nor may the Defendants herein be heard to say that the relief that they feel themselves entitled to in the suit sought to be enjoined herein is any different in substance from that described above. They seek, not a determination that certain named publications are obscene in the constitutional sense, but instead, they make demands for:

"1. Summons and an appropriate order for service of summons issued, and of all rules and orders.

2. For an interlocutory injunction:

(a) For injunctions, both temporary and permanent, against the conduct and operation of the Harem Book Store in and on the premises at No. 2979 Campbellton Road, S.W., in the City of Atlanta, Fulton County, Georgia, by any person.

(b) For an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed.

3. That a Rule Nisi be issued instanter requiring the defendants named herein to show cause why the prayers of this complaint should not be granted."

The conclusion is inescapable that Appellees Slaton and McAuliffe are engaged in a concerted action to impose a total and complete prior restraint upon the dissemination of *any* publications or materials by the Harem Book Store without regard to its effect upon protected speech and the rights of the citizens of Georgia and of the United States to purchase materials presumed to be protected by the *First Amendment.*

The Supreme Court of Georgia has approved, even in the absence of statute, the use of the nuisance label to control alleged obscenity. However, as will be seen, this Court has not approved the validity of such procedures and, in fact, the Supreme Court has granted *certiorari* in a case questioning the validity of the Appellees' injunctive method of dealing with alleged obscenity. The case referred to is *Paris Adult Theatre I, et al. v. Slaton, et al.*, No. 71-1051, certiorari granted 408 U.S. 921, argument heard October 19, 1972. This Court is referred to the third question presented therein.

The procedures sought to be utilized by Appellees herein are being utilized to close a bookstore without regard to its contents and thereby prevent further dissemination at that location of any publication to anybody, by any person.

Other cases in which State Court injunctive procedures have been reviewed by appellate courts almost invariably involve specific named publications or films which were before the Courts and adjudged obscene after hearing. Cf., *McKinney v. Alabama,* 254 So. 2d 714 (1971), *cert. denied* 405 U.S. 1075 (1972) [six (6) named magazines]; *State ex rel. Keating v. "Viven"*, 272 N.E. 2d 137, *pet. for cert. pending* in U.S. Supreme Court, No. 71-599, since January 29, 1971 [one (1) named film]; *Evans Theatre Corp. v.*

Slaton, 227 Ga. 377, *cert. denied* 404 U.S. 905 [the film "I Am Curious – Yellow", appeal from temporary restraining order]; *Art Theatre Guild, Inc. v. Rhodes*, 469 S.W. 2d 669 (Tenn. 1971), *pet. for cert. pending* in U.S. Supreme Court, No. 71-515, since October 9, 1971 [the film "Without a Stitch"]; *Paris Follies, Inc. v. State ex rel. Gerstein*, 259 So. 2d 532 (3rd Dist. App. Fla., 1972), Trial Court reversed in part, injunction against showing of "pornographic movies" reversed as overbroad [two (2) named films]; *For Adults Only, Inc. v. State ex rel. Gerstein*, 257 So. 2d 912 (1st. Dist. App. Fla., 1972), appeal pending, Florida Supreme Court [eleven (11) specific items]; *Mitchum v. Florida*, 251 So. 2d 298 (1st Dist. App. Fla., 1972), appeal pending, Florida Supreme Court, [225 exhibits stipulated to be representative]; *Marks v. City of Newport, Ky.*, _____ S.W. 2d _____ (Ky. Ct. App. 1972), Court enjoined "any obscene matter", including the five named publications), *pet. for cert. pending* in U.S. Supreme Court, No. 71-884, since October 1, 1972, with the prayer by Defendants herein that the Harem Bookstore be made to close its doors entirely and sell nothing at all, whether obscene or whether protected by the *First* and *Fourteenth Amendments*.

It should be noted that the Florida statute involved in all of the Florida cases cited above with the exception of *Paris Follies, Inc. v. State ex rel. Gerstein, supra*, has been declared unconstitutional by a Three-Judge Court in *Meyer v. Austin*, 319 F. Supp. 457 (1970), appeal pending *sub. nom., Austin v. Meyer*, No. 70-35, stay vacated June 26, 1972, _____ U.S. _____, 33 L.Ed. 2d 330.

From the foregoing, it can be said that in only a few cases has the dissemination of presumptively protected

materials been enjoined by a final judicial decision, when the specific materials enjoined had not first been declared obscene after a full judicial hearing, accompanied by appropriate judicial safeguards. Those isolated cases that do not are clearly erroneous under the reasoning of *Near v. Minnesota, supra; Organization for a Better Austin v. Keefe, supra; Mitchum v. Florida ex rel. Schaub, supra; New Riviera Art Theatre v. State, supra, Kingsley Books, Inc. v. Brown, supra; Blount v. Rizzi, supra,* and other cases cited hereinbefore.

CONCLUSION

The three-judge district court was incorrect in applying the *Younger v. Harris* and *Samuels v. Mackell* considerations to the Appellants' Complaint and Petition for Injunctive and Declaratory Relief because there was no criminal prosecution involved. The reliance upon *Palaio v. McAuliffe* was misplaced as that decision's "civil as basically enforcement of a criminal statute" rationale is clearly erroneous. Even assuming that the comity considerations do apply the threat of the closing of a bookstore provides the necessary special circumstances and irreparable injury to support injunctive and declaratory relief against the enforcement of statutes authorizing an impermissible prior restraint upon the distribution of materials conceded to be entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States.

This Court should reverse the dismissal of Appellants' action and direct the three-judge district court to proceed to a hearing on the merits.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALVIS G. SPEIGHT, t/a
HAREM BOOK STORE, and
JAMES L. CHANDLER,
Plaintiffs

v.

LEWIS R. SLATON, In his Capacity as District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, In his Capacity as Solicitor, Criminal Court of Fulton County,
Defendants

CIVIL ACTION NO. 17075

Before MORGAN, Circuit Judge, and MOYE and O'KELLEY, District Judges

MOYE, District Judge:

OPINION AND ORDER

Plaintiffs operate an establishment in Atlanta, Georgia, known as the Harem Bookstore. On August 23, 1972, pursuant to recently enacted Georgia statutes relating to obscenity,[1] the defendants herein brought a civil suit in the Georgia state courts to abate the Harem Bookstore as a public

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[1] Ga. Code Ann. §§ 26-2101, *et seq.* (1972).

nuisance.[2] On the same day the state court ordered plaintiffs herein to show cause why their bookstore should not be abated as a public nuisance, they brought this suit in federal court alleging that the materials sold in their bookstore were protected by the First Amendment and the attempt to abate their bookstore as a public nuisance was unconstitutional.[3] Plaintiffs challenged the constitutionality of the Georgia statutes as written and as applied and requested this Court to intervene in the state court proceedings and enjoin further use of the allegedly unconstitutional Georgia statutes. Since that time the state court suit has been stayed pending the outcome of this request for federal intervention.

The propriety of federal intervention in state court proceedings has been the subject of numerous recent Supreme Court and Fifth Circuit opinions. New guidelines for federal intervention in state court *criminal* proceedings were established by the Supreme Court in *Younger v. Harris*[4] and its companion cases.[5] But *Younger* specifically declined to

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[2] Civil proceedings to abate the bookstore as a public nuisance are authorized by the combined useage of § 26-2013 and § 72-202 of the Georgia Code. Section 26-2103 declares: "The use of any premises in violation of any of the provisions of this Chapter (relating to obscenity) shall constitute a public nuisance." Section 72-202 provides that the petition to abate a public nuisance "must proceed for the public on information filed by the solicitor general of the circuit." Thus, Georgia provides a method for civil enforcement of its criminal statutes relating to obscenity.

[3] Plaintiffs have properly asserted federal jurisdiction under 28 U.S.C.A. § 1343(3) based on a cause of action under 42 U.S.C.A. § 1983 and requested a three-judge court be convened pursuant to 28 U.S.C.A. §§ 2281 and 2284.

[4] 401 U. S. 37 (1970). The Court held "that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good faith attempts to enforce it" and federal courts should not intervene absent a showing of "bad faith, harassment, or any other unusual circumstance that would call for equitable relief." *Id.* at 54.

[5] *Samuels v. Mackell*, 401 U.S. 66 (1970); *Boyle v. Landry*, 401 U.S. 77 (1970); *Perez v. Ledesma*, 401 U.S. 82 (1970); *Dyson v. Stein*, 401 U.S. 200 (1970); *Byrne v. Karalexis*, 401 U.S. 216 (1970).

extend the applicability of those standards to intervention in state court *civil* proceedings.[6]

We need not pause here to analyze how the *Younger* standards should be applied in state court civil cases because the instant case does not present that situation. The situation before this Court does not involve a request for intervention in simply a Georgia state court civil case, but instead, a state court civil proceeding used to enforce Georgia's criminal laws. The propriety of federal intervention in these circumstances has been squarely decided by the Fifth Circuit Court of Appeals in *Palaio v. McAuliffe.*[7]

Palaio involved a fact situation strikingly similar to the instant case. In *Palaio,* plaintiffs requested the federal district court to enjoin Georgia civil and criminal suits which had been brought against them under Georgia obscenity laws. The federal district court refused to intervene and the court of appeals affirmed. The only difference between *Palaio* and the instant case is that in *Palaio* the state court had already heard the entire case and rendered a decision which was affirmed by the Georgia Supreme Court when the federal district court refused to intervene. Here, the state court civil suit has not yet begun and has been stayed pending the outcome of this case. As explained below, this distinction weighs heavily in favor of non-intervention.

In affirming the district court's refusal to intervene, the court of appeals in *Palaio* held:

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[6] Justice Stewart, concurring, stated that the Court was not dealing with "the considerations that should govern a federal court when it is asked to intervene in state civil proceedings where, for various reasons, the balance might be struck differently." (401 U.S. at 55).

[7] 466 F.2d 1230 (5th Cir. 1972).

"We believe, however, that application of the principles of *Younger* should not depend upon such labels as 'civil' or 'criminal', but rather should be governed by analysis of the competing interests that each case presents (and) when federal anticipatory relief will significantly affect a state's enforcement – by whatever means – of its criminal laws, then such relief is barred by the strong policy of noninterference, unless the plaintiff can meet the heavy burden of proof that *Younger* imposes."

* * *

"We thus pose a limited answer to the question expressly reserved in *Younger, supra,* by holding that, *where plaintiff is unable to prove the existence of 'special circumstances,' the principles of Younger bar federal intervention in a state civil proceeding that is an integral part of a state's enforcement of its criminal laws."*[8]

The instant case which we are requested to enjoin is, like *Palaio,* a state civil proceeding that is an integral part of the State of Georgia's enforcement of its criminal laws. In fact, the instant case presents an even stronger case for non-intervention than *Palaio* because the state laws which were claimed to be unconstitutional in *Palaio* had already been tested in the Georgia state courts prior to the request for intervention, while here the state law is a new statute and has not been ruled on by the Georgia state courts.

In support of *Palaio,* which was virtually a "gray horse" case, we could refer to *Mitchum v. Foster,* 407 U. S. 225 (1972), in which Chief Justice Burger, speaking for the dissent, consisting of Justices Burger, White and Blackmon [Justices Powell and Rehnquist not participating], suggested:

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[8] *Id.* at 1232-1233.

> "We have not yet reached or decided exactly how great a restraint is imposed by these principles on a federal court asked to enjoin state *civil* proceedings. Therefore, on remand in this case, it seems to me the District Court, before reaching a decision on the merits of appellant's claim, should properly consider whether general notions of equity or principles of federalism, similar to those invoked in *Younger*, prevent the issuance of an injunction against the state 'nuisance abatement' proceedings in the circumstances of this case." *Id.* at 244.

Furthermore, plaintiff consistently responded at the three-judge hearing that he could raise the same issues of constitutionality in the Georgia state courts. Consequently, this Court holds that the Georgia state court suit has not been brought in bad faith or for purposes of harrassment and that plaintiff has failed to present any "special circumstances which would justify federal intervention.

Accordingly, the complaint is DISMISSED.[9]

This day of , 1973.

LEWIS R. MORGAN,
United States Circuit Judge

/s/ CHARLES A. MOYE, JR.,
United States District Judge

/s/ WILLIAM C. O'KELLY,
United States District Judge

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[9] In view of the above holding, it is unnecessary for the Court to rule on defendant's motion requesting the Court to abstain from hearing this case until a decision has been reached in the Georgia state courts.

O'KELLEY, District Judge, Concurring:

I agree completely with the opinion of Judge Moye in this case.

It would appear that the dissent has attempted to reach the merits of the case before deciding the threshold question, that is if it should even have the case in the first place. The dissenting opinion would imply that our brothers on the state bench are neither willing nor able to apply the First Amendment of the United States Constitution. I do not agree that that is so. If a state trial judge errs, the Supreme Court of Georgia is available to correct his error. If they both err, that is not the end of the avenue when a federal constitutional right is at stake. The Supreme Court of the United States may accept certiorari and review the case even though it has found its course there through the state court system. This is federalism.

The Seventh Circuit has applied the principle of *Younger v. Harris,* 401 U.S. 37 (1971) to civil actions. *Cousins v. Wigoda,* 463 F.2d 603, (7 Cir. 1972). More recently, the Fourth Circuit, speaking through Judge Craven, extended that principle to the civil field saying:

> "The long-standing public policy against federal court interference with state court proceedings generally means that the jurisdiction of a state court first obtained should not be interferred with by federal courts.
>
> "The 'pendency' of state proceedings is one of the most important criteria in determining whether federal court intervention in state action is appropriate. . . . Because of the cost involved, in terms of both time and money, the divisive effect of unnecessary friction between coordinate courts and

> the clear obligation of state courts to decide questions arising under the United States Constitution, there is a presumption against federal interference." *Lynch v. Snepp*, _____ F.2d _____ 41 L.W. 2401 (4 Cir. 1973).

The *Lynch* case like this case dealt with a First Amendment question. The court implied that the statute at issue was possibly overbroad and imposed a prior restraint on the parties. That court felt, as does this court, that in order for the federal court to intervene, there must be no adequate remedy or appellate process in the state courts.

In the case *sub judice*, there is a single controversy pending in a court of the State of Georgia which may be litigated and appealed to a final determination. There is no allegation of harassment or inadequate remedy in the state court machinery.

If the statute under attack is so clearly unconstituional as contended by the dissent, surely the Georgia courts will so hold. I am of the opinion that they should first have that opportunity since that statute has never been before them for consideration.

For the foregoing reasons, this court should abstain from interference in the pending litigation and I concur with the opinion and order of Judge Moye.

MORGAN, Circuit Judge, dissenting:

I must respectfully dissent from the court's decision not to intervene in the state court proceedings.

First, I feel it is necessary to set out in detail exactly what the state is seeking in this proceeding. Over a period of

time agents of the state, apparently posing as customers, bought a number of "adult" books from the Harem Bookstore in southwest Atlanta. These items constituted the core of the evidence against the bookstore and its owners. The state first sought to prosecute the owners of the Harem Bookstore in a criminal proceeding under the state's obscenity laws.[1] The trial before a jury resulted in a mistrial with the jury unable to decide whether the materials were obscene. Having failed to this degree in direct criminal prosecution, the state moved to what the majority characterizes as its "civil enforcement of its criminal laws."

The suit this court is asked to enjoin was brought by the Fulton County District Attorney in the Superior Court for Fulton County.[2] The full scope of what the state sought and felt it was entitled to under the challenged statute is best illustrated by the District Attorney's prayer in the state court nuisance action:

> (a) . . . injunctions, both temporary and permanent, against the *conduct and operation* of the Harem Bookstore . . . *by any person*; and
>
> (b) . . . an order declaring *all merchandise* on said premises, *as well as all records, supplies, equipment and fixtures* used in connection with the advertising, sale and exhibition for sale of said merchandise, to be contraband and to be forfeited and destroyed. (Emphasis supplied).

It is patently obvious from a reading of this complaint that the government feels it is authorized by this statute to prohibit the sale of all literary material whatsoever at the site of this bookstore, that it is entitled to seize and destroy all literary materials now in that bookstore, whether they have ever been declared obscene or not,[3] and, finally, that they can seize and destroy all fixtures used within that bookstore, no matter what type of literary matter they are used to

display or advertise. A fair reading of this statute and its intent shows that this is indeed what the statute intends to authorize.

I find any statute authorizing such a remedy constitutionally abominable. It encourages and allows prior restraint of the first rank.[4] It is a direct impingement by the state on the precious rights of freedom of speech and freedom of press, guaranteed against state interference by the First and Fourteenth Amendments.

Acting under this statute, agents of the state could, by finding a single volume which they could successfully have declared legally obscene, seize and destroy every other book – including the Bible and the United States Constitution – which was found on the premises of the bookstore from which the legally obscene matter was obtained. Furthermore, they could enjoin permanently the operation of a bookstore at that location, no matter what type of presumptively protected First Amendment materials were to be disseminated therefrom. I can see no way that the action instituted by the District Attorney in this case and authorized by the state statute can be constitutional.

I also have a great deal of difficulty with the "civil as enforcement of criminal" rationale as applied in this case. First, I note that a criminal proceeding involving some[5] of these materials was unsuccessful. In that case the issue of whether or not the materials were obscene was to be decided by a jury and no conclusion was reached. In the instant case the issue of obscenity will be decided in an *in rem* proceeding brought in equity to abate a nuisance. Thus, certain protections are lost by the use of civil proceedings.

The most troublesome element for me, however, is the difference in effect between the criminal and the civil actions. The criminal proceeding with its attendant protections results in punishment of individuals. A civil proceeding designed only

to declare obscene and seize a certain publication only affects those publications which are adjudicated obscene in that proceeding. In those two types of cases I can agree that federal courts should eschew intervention, absent special circumstances.[6] However, I must reemphasize that the state proceeding under the statute challenged herein far exceeds in its impact on constitutionally protected rights either of the two preceding state court actions. It allows for the seizure and destruction of presumptively permitted and undeniably permitted First Amendment materials merely because they are found where an "obscene" book is found. It allows for permanent injunctive restraint *in futuro* against the dissemination by certain persons at a certain location of both presumptively protected and *undeniably* protected First Amendment materials. This difference, in effect, is crucial and it is this difference which, in my mind, also tips any blance to the position that intervention by a federal court is not only allowable, it is compelled.

It would seem to me that an adverse decision against the bookstore in state court could seriously damage these First Amendment rights despite any protections offered on appeal.[7]

The majority relies heavily on *Palaio v. McAuliffe*, 5 Cir. 1972, 466 F.2d 1230, for its decision that this court should abstain in the present case. First, I basically agree that federal courts should not intrude into state court proceedings where the only questions are whether or not the material involved is "obscene" or whether the definition of "obscenity" is constitutionally infirm. These are, of course, the only issues giving rise to the possibility of intervention by a federal court when the state court action is under a criminal statute or under a statute to declare the matter obscene and to allow seizure, as was the case in *Palaio*. I reiterate that these are not the questions in this case. We are not being asked to adjudicate the issue of obscenity or non-obscenity of the materials in question. Nor is the issue one of whether the Georgia obscenity definition is improper.[8] In fact, the full

panel at oral argument in this case rejected an attempt by the District Attorney to put these materials into evidence because it is irrelevant to the issues in this case whether or not these thirteen items were legally obscene.

While the language in *Palaio* is broad at some points, I am convinced that the court in *Palaio* did not intend to reach the situation presented in this case. It is my opinion that the statute in question completely transcends mere civil enforcement of criminal statutes when it includes the seizure and destruction of *protected* First Amendment materials which cannot be seized under any existing state law nor can persons offering such materials for sale be prosecuted for any criminal act; furthermore, there is no criminal law against operation of a bookstore nor can persons be criminally prosecuted for seeking to operate a bookstore in the future. Therefore, the state is not merely enforcing otherwise valid criminal laws through civil proceedings, it has in effect exceeded the bounds of criminal law by achieving a result under civil laws which it unquestionably could not have achieved under criminal statutes.[9]

Furthermore, even if I felt that the "civil as basically an enforcement of criminal law" rationale of *Palaio* were applicable to this case, I would still not feel that abstention was required. In a passage from *Palaio* quoted by the majority opinion in this case, the Fifth Circuit acknowledged that special circumstances could well justify intervention. This is, of course, a repetition of the basic test for intervention in criminal cases which was set out by the Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971). The special circumstances found to exist in that case were harassment by the state prosecutorial authorities and repeated threats of prosecution made in bad faith. In *Younger*, however, the Supreme Court took pains to point out that the special circumstances in *Younger* were not the only special circumstances which could ever be found and recognized that

other compelling reasons for intervention could exist. The Court directly pointed out one example wherein intervention would be proper:

> For example, as long ago as the Buck case, supra, we indicated "it is, of course, conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph and in whatever manner and against whomever an effort might be made to apply it." 313 U.S., at 402. 401 U.S., at 53-54.

I feel that the dangers from nonintervention in this case and the way this statute is written give sufficient justification for federal intervention on the grounds of special circumstances. It is not the issue of obscenity or non-obscenity of these materials nor the question of the constitutionality of the Georgia definition of "obscene" which compels intervention. Rather, this statute directly impinges on the right to disseminate unquestionably protected First Amendment materials and I cannot perceive any reasonable construction of the statute which would save it from invalidity.[10]

It is my opinion that a state can never enjoin the future operation of a store which disseminates presumptively First Amendment protected materials solely on the basis of the nature of the materials which were sold in that store in the past. Even if every item in that store were to be held legally obscene, I do not think that an injunction against any future sale of any literary material whatsoever at that site or by the proprietors could ever be held constitutional. In passing, I note again that the state's agents admitted that not all of the material currently in the Harem Bookstore is legally obscene. Therefore, allowing closure of this store as a public nuisance would prohibit the sale of protected First Amendment materials. The state does not challenge this statement.

Furthermore, it is my opinion that the state can never confiscate and destroy protected First Amendment materials no matter where they are found. Part of the remedy which the statute encompasses in the abatement context allows seizure of all literary material and fixtures found in the bookstore. This would unquestionably allow the state to seize and destroy as contraband protected materials and this is, indeed, the position which the state has taken in the state court proceeding we are asked to enjoin. I do not feel that where First Amendment materials are concerned the state has any right to seize and destroy protected materials merely because they are found in conjunction with unprotected ones. I do not believe the First Amendment allows such state action even as a penalty of forfeiture. I reject an analogy to confiscation of automobiles hauling non-taxpaid whiskey because of the special protection afforded First Amendment materials.

The statute itself is simple and straightforward. It defines any business wherein certain unprotected materials are found, those obscene under the criminal definition, as a public nuisance, subject to abatement. It is my view that there is no way to construe abatement of a public nuisance to avoid the constitutional infirmity I have set forth above. While the Georgia court might construe the statute narrowly to avoid the problem of seizing and destroying unquestionably protected First Amendment materials, I can see no way that the problem of closing the store or forcing it to cease operation as a bookstore can be read out of abatement of a public nuisance. The most which a state can do, in my opinion, is to bring prosecution under its criminal laws or bring specific actions for declaration of obscenity of specific materials, thus subjecting that to seizure and destruction. In that I feel this statute clearly goes beyond that, I can find no saving construction.[11]

Use of this nuisance procedure is an attempt by the state to avoid what it feels are difficulties in the two methods

currently available to the state in its battle with those who disseminate what it feels are undesirable literary materials. I feel that the existing methods, despite some problems, are fully adequate for protecting the state's interest without unduly trampling First Amendment rights. The state, however, apparently feels that available measures are too restrictive and has opted in this statute for a blanket approach which will "rid them of the vermin" in one fell swoop. Criminal prosecutions are difficult with the requirements of a unanimous jury verdict based on evidence beyond a reasonable doubt. Civil actions to determine specific materials obscene are difficult because they require a book by book determination of obscenity. The nuisance approach, however, allows the state to close down and totally eliminate the stores altogether upon the finding of a single legally obscene volume. This avoids the aforementioned difficulties inherent in the other proceedings.

I feel that the Supreme Court of the State of Georgia may have already approved of the use of the public nuisance approach to closing down activities involving "obscene" materials. In *Evans Theatre Corporation v. Slaton*, 227 Ga. 337 (1971), prior to the passage of the statute challenged herein, the Georgia Supreme Court stated that where dealing with allegedly obscene materials equity may act to enjoin an existing or threatened public nuisance. At oral argument the representatives of the state admitted that the challenged code section was drafted with reliance on this decision. While the *Evans* case is distinguishable because it involved showing of a film, in light of previous decisions in the area of obscene materials and freedom of speech and the press by the Georgia Supreme Court, I see no reason to delay the invalidation by this court of a statute which I feel is totally unconstitutional.

I also feel that there is directly threatened irreparable injury both in the pecuniary damage to which these plaintiffs are subjected and the potentially tremendous "chilling" effect of prosecutions under this statute with regard to others. While

these alone might not always justify intervention, when they are combined with the clear danger to undeniably protected materials which is so obviously present in this case, the balance is then tipped toward intervention. Once the Younger-Palaio problem is resolved, all other arguments for non-intervention seem to pale in light of the threatened harm to constitutionally protected rights.[1 2]

In summary, it is my opinion that the issue of the legal theory of abatement of a public nuisance as envisioned by Georgia Code Annotated, Title 26, Section 2103, providing: "The use of any premises in violation of any of the provisions of this chapter [relating to obscene materials] shall constitute a public nuisance", and the state's attempted means of abatement can never be constitutionally permissible under any reasonable construction of that statute because it would directly and admittedly impinge the sale of constitutionally protected matter. It cannot be limited to apply only to circumstances where the abatement is only of materials adjudicated obscene and still retain any viable meaning. Therefore, any reasonable basis for this statute's existence and for the terminology it contains, the statute must be intended to do exactly what the state alleges it gives them authority to do, at least with regard to closing the premises and enjoining future bookstore sales. I simply see no way that this statute can avoid conflict with the First Amendment as made applicable against the states by the Fourteenth Amendment, and, as stated above, I see no reason for abstention.

FOOTNOTES:

[1] 26 Ga. Code 2101-2104. These statutes were declared constitutional for criminal proceedings in *Gable v. Jenkins*, 309 F.Supp. 998 (N.D.Ga. 1969). These statutes are incorporated by reference in the "nuisance" statute here under attack.

[2] The statutes involved are 26-2103, herein challenged, and 72-202, the basic nuisance abatement statute.

[3] In the verification of its compliant in state court, the state admits that not all the materials which it seeks to seize are "legally obscene". It takes the position, however, that it has the right to seize these materials also.

[4] I find the prior restraint aspects in the issuance of an injunction prohibiting future operation of a bookstore. I do not believe the state can prohibit the dissemination of literary materials *in futuro* when the nature of such materials cannot be determined. Cf. *Near v. Minnesota*, 283 U.S. 697 (1931).

[5] There was a dispute as to whether all the materials purchased by the state were involved in the prosecution which ended in a hung jury, but it is clear several of them were.

[6] There is still one troubling problem with the "civil as criminal" rationale. In a criminal case, a defendant will always be guaranteed that a federal court will be available for full consideration of his constitutional claim, for even if certiorari is denied, he may still present his claim through *habeas corpus*. However, this is not an available remedy in a civil case so that failure to intervene will prevent consideration of the constitutional claims by a federal court unless certiorari is granted.

[7] First, an adverse decision by the trial court could lead to an immediate seizure and destruction or materials found in the bookstore, whether or not protected, unless some state court granted a stay pending appeal. Furthermore, because of the tremendous financial loss which could be occasioned by the finding of one "obscene" book on the premises of a bookstore the mere fact that this law might be used and that prosecutions are indeed being sought under it, could have, as I see it, an extremely serious "chilling effect" on guaranteed First Amendment freedoms. This point is elaborated *infra*.

[8]The plaintiffs attempt to challenge the underlying statutes arguing that *Gable v. Jenkins, supra,* did not include a challenge on the grounds they now raise. Because of my feelings on the nuisance statute itself, I do not reach this issue.

[9]The Challenge to the statute in the instant case is really more than a mere claim of vagueness or overbreadth. The state is asserting that under certain circumstances, not within those currently well-recognized, e.g., "clear and present danger", interfere with the distribution of admittedly protected literary materials. Thus, this is a case which goes further than merely requiring statutory construction.

[10]The majority points out as another reason for envoking abstention that this is a recent statute which has todate not been construed by the Georgia courts. In discussing my position that no construction of the statute could be constitutional, I set forth two reasons why I feel awaiting a state court interpretation of the statute would be futile. First, as noted, I cannot perceive any construction of the statute which will save it and, secondly, I feel that we already have a sufficient indication of the Georgia Supreme Court's position on this issue which illustrates the futility of awaiting a new construction from that Court.

[11]To hold that the statute only allows seizure of materials already adjudicated obscene would be to make the statute useless since the state already has that power.

[12]I can only point to the complete and cogent evaluation of abstention when First Amendment values are involved, set forth by Judge Irving Goldsberg of the Fifth Circuit in *Hobbs v. Thompson,* 1971, 448 F.2d 456. This excellent analysis points up the need for swift action in the federal courts to ensure adequate protection of the freedoms of speech and the press. In my mind it settles all other issues about abstention in this case.

APPENDIX B

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ALVIS G. SPEIGHT, t/a HAREM BOOK STORE, and JAMES L. CHANDLER, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the Final Order denying Plaintiffs' application for interlocutory injunction and dismissal of the Complaint and Petition for Injunction and Declaratory Judgment, said Order of denial and dismissal having been entered i this action on February 22, 1973.

This appeal is taken pursuant to *Title 28 U.S.C.* §*1253.*

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APPENDIX C

FIRST, FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, and Georgia Code §§ 26-2101, 26-2103 and 26-2104 and Title 72, Code of Georgia of 1933, as amended.

FIRST AMENDMENT,
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT,
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GEORGIA CODE ANNOTATED

26-2101

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word "knowing" as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be obscene under this section of the distribution thereof, deemed or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall be for the first offense be punished as for a

misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both.

(Acts 1968, pp. 1249, 1302; 1971, p. 344.)

26-2103

The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance.

(Acts 1971, pp. 344, 345.)

26-2104

Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband.

(Acts 1971, pp. 344, 345.)

TITLE 72, Code of Georgia of 1933, as amended.

Chap. 72-1 IN GENERAL.

72-101. (4457) **Definition in general.**—A nuisance is anything that works hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary reasonable man.

72-102. (4454) **Classes; public and private; definitions.**—Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals.

72-103. (4454, 4455) **Right of action to individual for public nuisance.**—Generally, a public nuisance gives no right of action to any individual. If a public nuisance shall cause special damage to an individual, in which the public do not

participate, such special damage shall give a right of action.

72-104. (4454, 4456) **Right of action to one injured in person or property.**—A private nuisance may injure either the person or property, or both, and in either case a right of action accrues to the person injured or damaged.

72-105. (4458) **Right of alienee of property injured. Liability of alienee of property causing nuisance.**—The alienee of a person owning the property injured may sue for a continuance of the nuisance; so the alienee of the property causing the nuisance is responsible for a continuance of the same. In the latter case there must be a request to abate, before action brought.

Chap. 72-2 ABATEMENT

72-201. (5329) **Manner of abatement.**—Any nuisance which tends to the immediate annoyance of the citizens in general, is manifestly injurious to the public health or safety, or tends greatly to corrupt the manners and morals of the people may be abated and suppressed by the order of any two or more justices of the peace of the county, founded upon the verdict of 12 freeholders of the same county, who shall be summoned, sworn, and impaneled for that purpose; which order shall be directed to and served by the sheriff of the county o; his deputy. (Acts 1833, Cobb, 817.)

72-202. (5330, 5338) **Public nuisance, how restrained.**—Private citizens may not generally interfere to have a public nuisance enjoined, but the petition must proceed for the public on information filed by the solicitor general of the circuit. A public nuisance may be abated on the application of any citizen specially injured. (50 Ga. 451; 76 Ga. 806.)

72-203. (5338) **Private nuisance; application by person injured for abatement.**—A private nuisance may be abated on the application of the person injured. (76 Ga. 806.)

72-204. (4459) **Injunction where consequences irreparable in damages.**—Where the consequences of a nuisance about to be erected or commenced will be irreparable in damages, and such consequences are not merely possible, but to a

reasonable degree certain, equity may interfere to arrest a nuisance before it is completed.

72-205. (5333) **Grist or sawmill or other water machinery; manner of abatement.**– If the nuisance complained of is a grist or sawmill, or other valuable water machinery, the same shall not be destroyed or abated except upon the affidavit of two or more freeholders, before the ordinary of the county in which the nuisance complained of exists, testifying that the health of the neighborhood, according to their opinion and belief, is materially injured by such milldam, or other obstruction to a watercourse by other machinery, as may be complained of; whereupon it shall be the duty of such ordinary, as soon as practicable, to cause a jury of 12 men to be summoned by the sheriff or his deputy, for the trial of the cause, who, together with the said court, shall attend at the courthouse of said county to adjudge the case of nuisance complained of; and all parties shall have a reasonable time allowed them to summon their witnesses and procure their attendance. (Act 1833, Cobb, 817, Acts 1874, p. 21.)

72-206. (5334) **Same; how jury obtained in abatement proceeding.**- In all cases of nuisance, when the nuisance complained of is a grist or sawmill, or other valuable water machinery, and application has been made to have such nuisance abated as is provided for in section 72-205, it shall be the duty of the ordinary of the county to take from the jury list of file in the clerk's office of the superior court of said county 100 names, to be written on separate pieces of paper and placed by him in a box, and from said box he shall draw 24 jurors, and make out a list of the jurors so drawn and deliver a copy thereof to the sheriff or his deputy, who shall summon said jurors at least two days before the time set for the hearing of said case, in the same manner that jurors are summoned in the superior court; said jurors so summoned shall attend at the courthouse of said county at the time specified in said summons; and if any of said jurors shall be disqualified from serving for any legal cause, it shall be the duty of the sheriff or his deputy, under direction of said

ordinary, to summon a sufficient number of tales jurors to complete the panel of 24, and from said panel a jury of 12 shall be stricken, the parties plaintiff and defendant having six strikes each; and the persons serving under this section shall be entitled to the same per diem allowed jurors in the superior court of the county where such trial is had. (Acts 1875, pp. 24, 25; 1882-3, p. 71.)

72-207. (5339) **Same; fees of ordinaries, witnesses, and jury.**— When it may become necessary for the ordinary, or other tribunal authorized by this Code so to do, to cause a jury to be summoned and impaneled to try a cause of nuisance arising from water machinery, milldam, or otherwise, the ordinary, witnesses, and jurors shall be allowed such fees in said causes as are allowed by law in like cases in superior courts. (Act 1837, Cobb, 361.)

72-208. (5340) **Same; compensation for removing nuisance.**— The sheriff, or other officer, when acting under the order of said ordinary, or other tribunal, shall remove any nuisance, machinery, or milldam, for which he shall be allowed such compensation as is prescribed in section 24-2823. (Act 1837, Cobb, 361, Acts 1871-2, p. 51.)

Chap. 72-3. HOUSES OF PROSTITUTION.

72-301. **Houses and contents declared a nuisance.**— Whosoever shall knowingly erect, establish, continue, maintain, use, own, or lease any building, structure, or place used for the purpose of lewdness, assignation, or prostitution shall be guilty of maintaining a nuisance, and the building, structure, or place, and the ground itself in or upon which such lewdness, assignation, or prostitution shall be conducted, permitted, or carried on, continued, or shall exist, and the furniture, fixtures, musical instruments, and other contents of such building or structure are also declared to be a nuisance, and may be enjoined and abated as hereinafter provided. (Acts 1917 p. 178.)

72-302. **Action to enjoin nuisance, how and by whom brought; temporary injunction.**— Whenever a nuisance is kept,

maintained, or exists, as defined in the preceding section, the solicitor general or any citizen of the county may maintain an action in the name of the State upon the relation of such solicitor general or citizen to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building upon which such nuisance exists. In such action, the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, order a temporary injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, or oral testimony or otherwise, as the complainant may elect, unless the court or judge, by previous order, shall have directed the form and manner in which the evidence shall be presented, that such nuisance does in fact exist. (Acts 1917, p. 178.)

72-303. **Notice of hearing on application.**– Three days' notice in writing shall be given the defendant of the hearing of the application and, if then continued at his instance, the temporary injunction as prayed shall be granted as a matter of course. (Acts 1917, p. 179.)

72-304. **Injunction binding throughout judicial district. Contempt.**– When an injunction shall have been granted it shall be binding on the defendant throughout the judicial circuit in which it was issued, and any violation of the provisions of the injunction shall be a contempt of court as hereinafter provided. (Acts 1917, p. 178.)

72-305. **Trial; time; evidence of reputation of place.**– The action shall be triable as other cases in equity and at the first term of the court. In such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of such nuisance. (Acts 1917, p. 179.)

72-306. **Dismissal of complaint. When solicitor or citizen may be substituted for complaining party.**– If the complaint is filed by a citizen, it shall not be dismissed except upon a sworn statement by the complainant and his attorney setting forth the reasons why the action should be dismissed, and the dismissal approved by the solicitor general in writing or in

open court. If the court shall be of the opinion that the action ought not to be dismissed, he may direct the solicitor general to prosecute said action to judgment, and if the action shall be continued more than one term of court, any citizen of the county or the solicitor general may be substituted for the complaining party and prosecute said action to judgment. (Acts 1917, p. 179.)

72-307. **Costs, to whom taxed.**– If the action shall be brought by a citizen and the court shall find that there was no reasonable ground or cause for said action, the cost may be taxed to such citizen. (Acts 1917, p. 179.)

72-308. **Violation of injunction; punishment for contempt; proceedings.**– In case of the violation of any injunction granted under the provisions of this Chapter the court, or, in vacation, a judge thereof, may summarily try and punish the offender. The proceeding shall be commenced by filing with the clerk of court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt shall be punished as for contempt in the discretion of the judge. (Acts 1917, p. 179.)

72-309. **Abatement, order of; contempt of court; fees for removing and selling property.**– If the existence of the nuisance shall be established in an action as provided in this Chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or other movable property used in conducting the nuisance and shall direct the sale thereof in the manner provided for the sale of chattels under execution: Provided, that if it shall appear to the judge that the furniture and chattels are owned by others than the inmates of said house, he may order the effectual closing of the building or place against its use for any purpose, and keeping it closed for a period of one year, unless sooner released. If any person shall

break and enter or use a building, structure, or place so directed to be closed, he shall be punished as for contempt as provided in the preceding section. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises, and keeping them closed a reasonable sum shall be allowed by the court. (Acts 1917, p. 180).

72-310. **Proceeds of sales.**– The proceeds of the sale of the personal property, as provided in the preceding sections, shall be applied in payment of the cost of the action and abatement, and the balance, if any, shall be paid to the defendant. (Acts 1917, p. 180.)

72-311. **Bond to abate; release of property.**– If the owner shall appear and pay all cost of the proceedings, and file a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept within a period of one year thereafter, the court, or in vacation, the judge, may, if satisfied of his good faith, order the premises, closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property; and if the proceedings be an action in equity, and said bond be given and cost therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment lien, penalty or liability to which it may be subject by law. (Acts 1917, p. 180.)

72-312. **Permanent injunction; money judgment; lien.**– Whenever a permanent injunction issues against any person for maintaining a nuisance as herein described, or against any owner of the building knowingly kept or used for the purposes prohibited by this Chapter, the judge granting said injunction shall, at the same time, enter up judgment against the person, firm or corporation owning said building in the

sum of $300, and said judgment shall be a special lien upon the premises, and the furniture and fixtures therein, complained of, and shall as against said property rank from date with all other judgments or liens as now provided for by law. Said judgment shall issue in the name of the State, and be enforced as other judgments in this State: Provided, that the lien of the judgment herein provided for upon said property, real and personal, used for the purpose of maintaining said nuisance, shall not relieve the person or building from any of the other penalties provided by law. All sums arising from the enforcement of the judgments in this section referred to shall be paid into the treasury of the county in which said judgment is rendered and become part of the general funds of said county. (Acts 1917, p. 181.)

Chap. 72-4. NUISANCES IN CITIES.

72-401. (5331) **Manner of abatement; jurisdiction of police court.**— If a nuisance complained of shall exist in a town or city under the government of a mayor, intendant, aldermen, wardens, or a common council or commissioners, such nuisance, by and with the advice of said aldermen, wardens, council, or commissioners, may be abated and removed by order of said mayor, intendant, or commissioners; but if the nuisance complained of shall exist in a city having a population of 20,000 or more, the police court of such city, whether known as mayor's or recorder's court or otherwise designated, shall have jurisdiction to hear and determine the question of the existence of such nuisance, and, if found to exist, to order its abatement, which order shall be directed to and executed by the sheriff or the marshal of said town or city, or his deputy. (Act 1833, Cobb, 817, Acts 1892, p. 64.)

72-402. (5332) **Notice of meeting to determine question of abatement.**— Reasonable notice shall be given to the parties interested of the time and place of the meeting of such mayor, intendant, aldermen, wardens, council, or commissioners. (Act 1833, Cobb, 817.)

72-9901. (681 P.C.) **What nuisances are indictable.**– Any person who shall erect or continue after notice to abate, a nuisance which tends to annoy the community, to injure the health of the citizens in general, or to corrupt the public morals, shall be guilty of a misdemeanor. (Act 1833, Cobb, 817.)

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IN THE

Supreme Court of the United States

October Term, 1972

NO. 72-1557

ALVIS G. SPEIGHT, t/a HAREM BOOK STORE, and JAMES L. CHANDLER,

Appellants,

v.

LEWIS R. SLATON, In his capacity as District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, In his capacity as Solicitor, Criminal Court of Fulton County,

Appellees.

MOTION TO DISMISS THE APPEAL OR TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA.

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IN THE

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Appellees.

MOTION TO DISMISS THE APPEAL OR TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA.

Appellees, pursuant to Rules 16 (1) (c) of the revised Rules of the Supreme Court of the United States move to dismiss the above entitled appeal or in the alternative to affirm the judgment of the United States District Court for the Northern District of Georgia on the ground that the appeal fails to present any substantial Federal question and further it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTION PRESENTED

Appellees contend that the sole question to be determined is: WHETHER IT IS MANDATORY UPON THE FEDERAL COURT TO INTERVENE IN AND ENJOIN A STATE COURT PROCEEDING IN THE ABSENCE OF SPECIAL CIRCUMSTANCES WHICH WOULD JUSTIFY FEDERAL INTERVENTION?

CORRECTIONS OF LAW AND FACT

Appellants on page A.22 represent that Georgia Code Section 72-201 entitled "Manner of Abatement" is a valid statute in the State of Georgia. This Code Section, 72-201, was declared unconstitutional by the Supreme Court of Georgia in Sizemore v. Koker, 220 Ga. 773; 141 S.E. 2d 891 in 1965, 7 years prior to the filing of these proceedings.

The State Court proceeding filed by Appellees in their official capacity, involves transactions extending from July 28, 1971 to May 31, 1972, and was not based on a single isolated transaction. Jurisdictional Statement Page 5.

STATEMENT

Appellees in their official capacity filed an action to abate a nuisance upon the authority of new Georgia Code Section 26-2103 and Section 26-2104 enacted in 1971 by the General Assembly of Georgia in an act which became effective on April 1, 1971. This statute has not been construed or passed upon by the Trial Courts or the Appellate Courts in the State of Georgia.

All of the alleged obscene material referred to in the Complaint in the State Court action were purchased

from the Defendant and at no time was any material seized under a Judicial process. On the same day the State Court ordered Plaintiffs (Appellants herein) to show cause why their book store should not be abated as a public nuisance they filed their Petition for Removal in the United States District Court for the Northern District of Georgia upon the grounds that "Petitioners cannot enforce, in the Courts of the State of Georgia, a right under the free speech and press provisions of the Constitution of the State of Georgia***." A copy of the State Court Complaint was attached thereto however they failed to include the Exhibits which were made a part of and incorporated in the Complaint and which are attached hereto. These Exhibits are a series of photographs which portray the exterior signs and interior displays of the material sold by Appellants, imitation penises and the female dummy with her vagina exposed which according to the Complaint occupies a prominent position in said building.

The Appellants thereafter and on August 28, 1972, filed their Complaint in the United States District Court for the Northern District of Georgia, for a preliminary injunction, permanent injunction, declaratory judgment and convocation of a three-judge court challenging the constitutionality of the Georgia statutes as written and as applied and requested the Court to intervene in the State Court proceedings and enjoin further use of the allegedly unconstitutional Georgia statutes.

A three-judge Court was convened and after a hearing during which Plaintiffs (Appellants herein) consistently responded that they could raise the same issues of constitutionality in the Georgia State Courts,

and finding no special circumstances which would justify Federal intervention the Court dismissed the Complaint on February 22, 1973.

REASONS FOR GRANTING THE MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM.

As recently as May 7, 1973, this Court in the case of Thomas S. Gibson v. L. M. Berryhill Case No. 71-653, 41 U.S.L.W. 4576, 4579 restated the doctrine of abstention:

> "and finally, there is the doctrine developed in our cases at least since Railroad Commission v. Pullman, 312 U.S. 496 (1941), that when confronted with the issues of constitutional dimensions which implicate or depend upon *unsettled questions of State law* a Federal Court ought to abstain and stay its proceedings until those State law questions are definitely resolved." (Emphasis Added).

Appellees recognize that in Mitchum v. Foster, 407 U.S. 225; 32 L.Ed.2d 705 decided June 19, 1972, it was held that Federal Courts are not absolutely without power to enjoin a proceeding pending in State Court under any circumstances whatsoever. Mitchum was remanded for further proceedings consistent with that opinion.

Mr. Chief Justice Burger, with whom Mr. Justice White and Mr. Justice Blackmun joined in a concurring opinion stated:

> "I concur in the opinion of the Court and add a few words to emphasize what the Court is and is not deciding today as I read the opinion. The Court holds only that 28 USC Section 2283, which is an absolute bar to injunctions against state court

> proceedings in most suits, does not apply to a suit brought under 42 USC Section 1983 seeking an injunction of state proceedings. But, as the Court's opinion has noted, it does nothing to "question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." Ante, at ——, 32 L. Ed. 2d at 718. In the context of pending state criminal proceedings, we held in Younger v. Harris, 401 US 37, 27 L Ed 2d 669, 91 S. Ct. 746 (1971), that these principles allow a federal court properly to issue an injunction in only a narrow class of circumstances. We have not yet reached or decided exactly how great a restraint is imposed by these principles on a federal court asked to enjoin state civil proceedings. Therefore on remand in this case, it seems to me the District Court, before reaching a decision on the merits of petitioner's claim, should properly consider whether general notions of equity or principles of federalism, similar to those invoked in Younger, prevent the issuance of an injunction against the state "nuisance abatement" proceedings in the circumstances of this case."

The three-judge tribunal in the case at bar did properly consider whether the general notions of equity or principles of federalism prevent the issuance of an injunction against the state court proceedings and remanded the case to the State Court quoting the above concurring opinion and further stating in the last paragraph of said order:

> "Furthermore, Plaintiff consistently responded at the three-judge hearing that he could raise the same issues of constitutionality in the Georgia State Courts. *Consequently, this Court holds that the Georgia State Court suit has not been brought in bad faith or for the purposes of harassment and that*

Plaintiff has failed to present any "special circumstances which would justify federal intervention."

This is consistent with the long and continuous lines of decisions from this Court and the United States Courts of Appeal. Palaio v. McAuliffe, 456 F. 2d 1230 (5th Cir. 1972); Cousins v. Wigoda, 463 Fed. 2d 603 (7th Cir. 1972) and the 4th Circuit which held in the case of Lynch v. Snepp, ____F. 2d____, 41 U.S.L.W. 2401:

> "The long standing public policy against federal court interference with state court proceedings generally means that the jurisdiction of a state court first obtained should not be interfered with by federal courts.
>
> "The 'pendency' of state proceedings is one of the most important criteria in determining whether federal court intervention in state action is appropriate. . . . Because of the cost involved, in terms of both time and money, the divisive effect of unnecessary friction between coordinate courts and the clear obligation of state courts to decide questions arising under the United States Constitution, there is a presumption against federal interference."

In Judge O'Kelley's concurring opinion dismissing the complaint and remanding this case to the State Courts he stated:

> "If a state trial judge errs, the Supreme Court of Georgia is available to correct his error. If they both err, that is not the end of the avenue when a federal constitutional right is at stake. The Supreme Court of the United States may accept certiorari and review the case even though it has found its course there through the state court system. This is federalism."

CONCLUSION

For all of the foregoing reasons Appellees respectfully conclude that the order and judgment of the United States District Court for the Northern District of Georgia should be affirmed without further argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, that I have this day deposited in the United States Post Office, Atlanta, Georgia, two (2) copies of the foregoing Motion To Dismiss The Appeal Or To Affirm The Judgment Of The United States District Court, Northern District of Georgia with First Class postage pre-paid, addressed to MR. ROBERT EUGENE SMITH, GILBERT H. DEITCH and D. FREEMAN HUTTON, 2005 One Hundred Colony Square, Atlanta, Georgia 30361, Counsel of record for Appellants.

That all persons required to be served have been served.

This the _____ day of June, 1973.

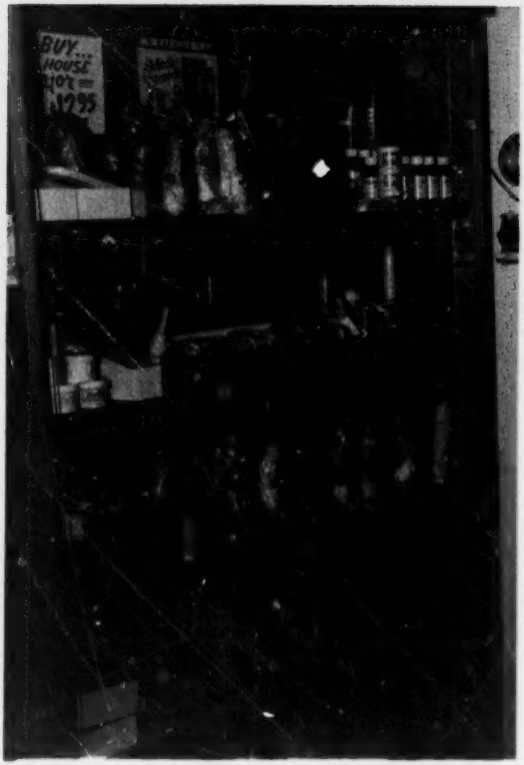
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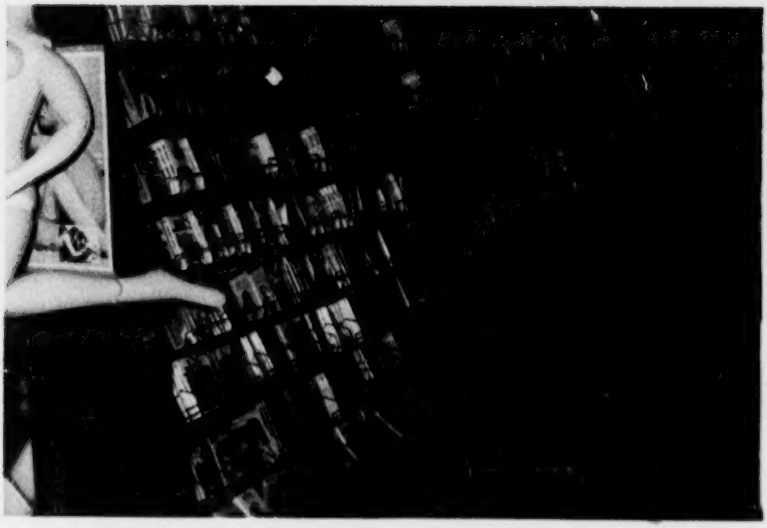
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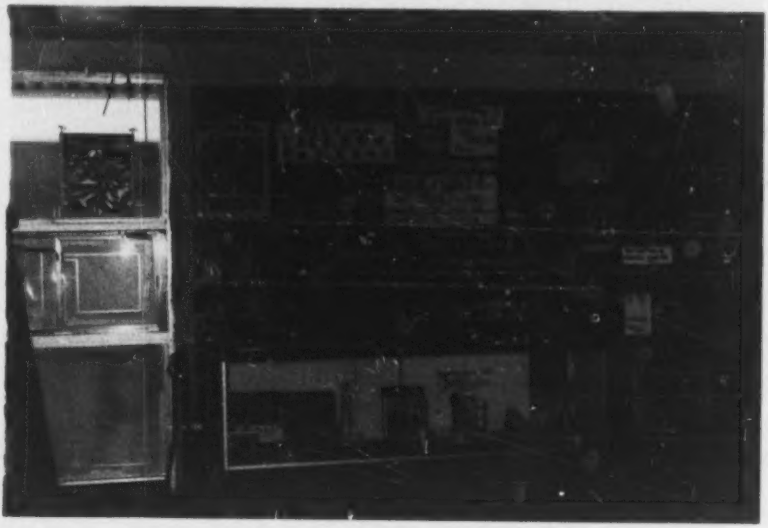

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1557

ALVIS G. SPEIGHT, t/a
HAREM BOOK STORE and
JAMES L. CHANDLER,
Appellants,

v.

LEWIS R. SLATON, In his capacity as
District Attorney, Atlanta Judicial
Circuit, and HINSON McAULIFFE, In his
capacity as Solicitor General,
Criminal Court of Fulton County,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF GEORGIA

APPELLANTS' BRIEF

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IN THE

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NO. 72-1557

ALVIS G. SPEIGHT, t/a
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District Attorney, Atlanta Judicial
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capacity as Solicitor General,
Criminal Court of Fulton County,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF GEORGIA

APPELLANTS' BRIEF

OPINIONS BELOW

The Opinions and Order of the various members of the statutory three-judge court sitting in the United States District Court for the Northern District of Georgia entered on February 22, 1973 are found at pages A.1 through A.17, inclusive, of the Jurisdictional Statement.

JURISDICTION

The judgment of the three-judge district court (opinion by Judge Moye, with Judge O'Kelly specially concurring, Circuit Judge Morgan dissenting) was entered on February 22, 1973, denying the requested preliminary and permanent injunctive relief as to the constitutionality of the use of *Georgia Code Annotated* §§*26-2101* (Ga. L. 1968, pp. 1249, 1302; 1971, p. 344), *26-2103* (Ga. L. 1971, pp. 344, 345) and *26-2104* (Ga. L. 1971, pp. 344-345) as well as Georgia's nuisance statutes, *Title 72, Georgia Code of 1933,* as amended, and declaratory judgment as to their constitutionality as written and as applied or threatened to be applied against appellants herein.

The jurisdiction of this Court to review that decision is conferred by *Title 28 U.S.C. 1253,* there having been an Order denying injunctive relief in a civil action required by Congress to be heard by a district court of three judges. (*Title 28 U.S.C.* §§ *2281* and *2284.*)

On October 9, 1973, this Court noted probable jurisdiction.

QUESTION PRESENTED

Whether the *Younger v. Harris,* 401 U.S. 37 (1971) and *Samuels v. Mackell,* 401 U.S. 66 (1971) requirements for injunctive and declaratory relief were correctly applied by the majority of the Court in the context of First Amendment freedoms and prior restraint where there was at the time of the institution of federal suit a pending State civil proceeding and no jurisdictional threat existed regarding State criminal prosecution?

STATUTORY PROVISIONS INVOLVED

The provisions of *Georgia Code Annotated* §§26-2101 through 26-2104 provide in pertinent part as follows:

26-2101

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word "knowing" as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be obscene under this section of the distribution thereof, deemed or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall be for the first offense be punished as for a

misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both.

(Acts 1968, pp. 1249, 1302; 1971, p. 344.)

26-2103

The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance.

(Acts 1971, pp. 344, 345.)

26-2104

Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband.

(Acts 1971, pp. 344, 345.)

Chap. 72-1 CODE OF GEORGIA 1933, AS AMENDED, PROVIDES:

72-101. (4457) **Definition in general.**—A nuisance is anything that works hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary reasonable man.

72-102. (4454) **Classes; public and private; definitions.**—Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals.

72-103. (4454, 4455) **Right of action to individual for public nuisance.**—Generally, a public nuisance gives no right of action to any individual. If a public nuisance shall cause special damage to an individual, in which the public do not

participate, such special damage shall give a right of action.

72-104. (4454, 4456) **Right of action to one injured in person or property.**—A private nuisance may injure either the person or property, or both, and in either case a right of action accrues to the person injured or damaged.

72-105. (4458) **Right of alienee of property injured. Liability of alienee of property causing nuisance.**—The alienee of a person owning the property injured may sue for a continuance of the nuisance; so the alienee of the property causing the nuisance is responsible for a continuance of the same. In the latter case there must be a request to abate, before action brought.

Chap. 72-2 ABATEMENT

72-201. (5329) **Manner of abatement.**—Any nuisance which tends to the immediate annoyance of the citizens in general, is manifestly injurious to the public health or safety, or tends greatly to corrupt the manners and morals of the people may be abated and suppressed by the order of any two or more justices of the peace of the county, founded upon the verdict of 12 freeholders of the same county, who shall be summoned, sworn, and impaneled for that purpose; which order shall be directed to and served by the sheriff of the county o; his deputy. (Acts 1833, Cobb, 817.)

72-202. (5330, 5338) **Public nuisance, how restrained.**—Private citizens may not generally interfere to have a public nuisance enjoined, but the petition must proceed for the public on information filed by the solicitor general of the circuit. A public nuisance may be abated on the application of any citizen specially injured. (50 Ga. 451; 76 Ga. 806.)

72-203. (5338) **Private nuisance; application by person injured for abatement.**—A private nuisance may be abated on the application of the person injured. (76 Ga. 806.)

72-204. (4459) **Injunction where consequences irreparable in damages.**—Where the consequences of a nuisance about to be erected or commenced will be irreparable in damages, and such consequences are not merely possible, but to a reasonable degree certain, equity may interfere to arrest a nuisance before it is completed.

Chap. 72-3. HOUSES OF PROSTITUTION.

72-301. **Houses and contents declared a nuisance.**– Whosoever shall knowingly erect, establish, continue, maintain, use, own, or lease any building, structure, or place used for the purpose of lewdness, assignation, or prostitution shall be guilty of maintaining a nuisance, and the building, structure, or place, and the ground itself in or upon which such lewdness, assignation, or prostitution shall be conducted, permitted, or carried on, continued, or shall exist, and the furniture, fixtures, musical instruments, and other contents of such building or structure are also declared to be a nuisance, and may be enjoined and abated as hereinafter provided. (Acts 1917 p. 178.)

72-302. **Action to enjoin nuisance, how and by whom brought; temporary injunction.**– Whenever a nuisance is kept, maintained, or exists, as defined in the preceding section, the solicitor general or any citizen of the county may maintain an action in the name of the State upon the relation of such solicitor general or citizen to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building upon which such nuisance exists. In such action, the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, order a temporary injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, or oral testimony or otherwise, as the complainant may elect, unless the court or judge, by previous order, shall have directed the form and manner in which the evidence shall be presented, that such nuisance does in fact exist. (Acts 1917, p. 178.)

72-303. **Notice of hearing on application.**– Three days' notice in writing shall be given the defendant of the hearing of the application and, if then continued at his instance, the temporary injunction as prayed shall be granted as a matter of course. (Acts 1917, p. 179.)

72-304. **Injunction binding throughout judicial district. Contempt.**– When an injunction shall have been granted it

shall be binding on the defendant throughout the judicial circuit in which it was issued, and any violation of the provisions of the injunction shall be a contempt of court as hereinafter provided. (Acts 1917, p. 178.)

72-305. **Trial; time; evidence of reputation of place.**— The action shall be triable as other cases in equity and at the first term of the court. In such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of such nuisance. (Acts 1917, p. 179.)

72-306. **Dismissal of complaint. When solicitor or citizen may be substituted for complaining party.**— If the complaint is filed by a citizen, it shall not be dismissed except upon a sworn statement by the complainant and his attorney setting forth the reasons why the action should be dismissed, and the dismissal approved by the solicitor general in writing or in open court. If the court shall be of the opinion that the action ought not to be dismissed, he may direct the solicitor general to prosecute said action to judgment, and if the action shall be continued more than one term of court, any citizen of the county or the solicitor general may be substituted for the complaining party and prosecute said action to judgment. (Acts 1917, p. 179.)

72-307. **Costs, to whom taxed.**— If the action shall be brought by a citizen and the court shall find that there was no reasonable ground or cause for said action, the cost may be taxed to such citizen. (Acts 1917, p. 179.)

72-308. **Violation of injunction; punishment for contempt; proceedings.**— In case of the violation of any injunction granted under the provisions of this Chapter the court, or, in vacation, a judge thereof, may summarily try and punish the offender. The proceeding shall be commenced by filing with the clerk of court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt shall be punished as for contempt in the discretion of the judge. (Acts 1917, p. 179.)

72-309. **Abatement, order of; contempt of court; fees for removing and selling property.**– If the existence of the nuisance shall be established in an action as provided in this Chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or other movable property used in conducting the nuisance and shall direct the sale thereof in the manner provided for the sale of chattels under execution: Provided, that if it shall appear to the judge that the furniture and chattels are owned by others than the inmates of said house, he may order the effectual closing of the building or place against its use for any purpose, and keeping it closed for a period of one year, unless sooner released. If any person shall break and enter or use a building, structure, or place so directed to be closed, he shall be punished as for contempt as provided in the preceding section. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises, and keeping them closed a reasonable sum shall be allowed by the court. (Acts 1917, p. 180).

72-310. **Proceeds of sales.**– The proceeds of the sale of the personal property, as provided in the preceding sections, shall be applied in payment of the cost of the action and abatement, and the balance, if any, shall be paid to the defendant. (Acts 1917, p. 180.)

72-311. **Bond to abate; release of property.**– If the owner shall appear and pay all cost of the proceedings, and file a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept within a period of one year thereafter, the court, or in vacation, the judge, may, if satisfied of his good faith, order the premises, closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property; and if the proceedings be an action in equity, and

said bond be given and cost therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment lien, penalty or liability to which it may be subject by law. (Acts 1917, p. 180.)

72-312. **Permanent injunction; money judgment; lien.**– Whenever a permanent injunction issues against any person for maintaining a nuisance as herein described, or against any owner of the building knowingly kept or used for the purposes prohibited by this Chapter, the judge granting said injunction shall, at the same time, enter up judgment against the person, firm or corporation owning said building in the sum of $300, and said judgment shall be a special lien upon the premises, and the furniture and fixtures therein, complained of, and shall as against said property rank from date with all other judgments or liens as now provided for by law. Said judgment shall issue in the name of the State, and be enforced as other judgments in this State: Provided, that the lien of the judgment herein provided for upon said property, real and personal, used for the purpose of maintaining said nuisance, shall not relieve the person or building from any of the other penalties provided by law. All sums arising from the enforcement of the judgments in this section referred to shall be paid into the treasury of the county in which said judgment is rendered and become part of the general funds of said county. (Acts 1917, p. 181.)

Chap. 72-4. NUISANCES IN CITIES.

72-401. (5331) **Manner of abatement; jurisdiction of police court.**– If a nuisance complained of shall exist in a town or city under the government of a mayor, intendant, aldermen, wardens, or a common council or commissioners, such nuisance, by and with the advice of said aldermen, wardens, council, or commissioners, may be abated and removed by order of said mayor, intendant, or commissioners; but if the nuisance complained of shall exist in a city having a population of 20,000 or more, the police court of such city,

whether known as mayor's or recorder's court or otherwise designated, shall have jurisdiction to hear and determine the question of the existence of such nuisance, and, if found to exist, to order its abatement, which order shall be directed to and executed by the sheriff or the marshal of said town or city, or his deputy. (Act 1833, Cobb, 817, Acts 1892, p. 64.)

72-402. (5332) **Notice of meeting to determine question of abatement.**– Reasonable notice shall be given to the parties interested of the time and place of the meeting of such mayor, intendant, aldermen, wardens, council, or commissioners. (Act 1833, Cobb, 817.)

Chap. 72-99. CRIMES.

72-9901. (681 P.C.) **What nuisances are indictable.**– Any person who shall erect or continue after notice to abate, a nuisance which tends to annoy the community, to injure the health of the citizens in general, or to corrupt the public morals, shall be guilty of a misdemeanor. (Act 1833, Cobb, 817.)

STATEMENT

On August 21, 1972, Appellees instituted an action in the Superior Court of Fulton County, Georgia, seeking to obtain temporary and permanent injunctions against the conduct and operation of the Harem Book Store in and on the premises at No. 2979 Campbellton Road, S.W., Atlanta, Georgia, by any person and an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed. A Rule Nisi was issued requiring Appellants to show cause before his Honor, Judge Claude D. Shaw, at 9:30 a.m. on August 25, 1972, then and there to be heard, why the prayers of the complaint should not be granted.

On the date set for hearing a removal action was filed in the United States District Court for the Northern District of Georgia thereby divesting the Fulton Superior Court of jurisdiction. Subsequently, Appellants filed the instant complaint for preliminary and permanent injunctions against the further use of Ga. Code Ann. §§26-2101 (Ga.L. 1968, pp. 1249, 1302; 1971, p. 344), 26-2103 (Ga.L. 1971, pp. 344, 345) and 26-2104 (Ga.L. 1971, pp. 344-345) as well as Georgia's Nuisance statutes, Title 72, Georgia Code of 1933, as amended, and declaratory judgments as to their unconstitutionality as written and as applied or threatened to be applied against Appellants. The requisite three-judge court was requested pursuant to 28 U.S.C. §§2281 and 2284.

The single District Judge to whom the case was referred stayed his ruling on the Appellees' motion to remand in the removal action pending a decision by the three-judge panel.

The Appellees sought to utilize a Georgia statute, Ga. Code Ann. §26-2103, which declared that the use of any premises in violation of any of the provisions of Chapter 26-21 of the Criminal Code of Georgia shall constitute a public nuisance. Chapter 26-21 is the portion of the Georgia Code dealing with the distribution of obscene materials. Georgia Code Ann. §26-2104 was also invoked by Appellees. That section declares that any materials declared to be obscene by the provisions of Chapter 26-21 and advertisements for such materials are contraband.

The statutory provisions of Ga. Code Ann. §26-2101 were attacked by Appellants as being unconstitutional on vagueness and overbreadth grounds. *Miller v. California*, ____ U.S. ____; 37 L.Ed.2d. 419 (1973).

Georgia Code Ann. §26-2103 and Title 72 of the Georgia Code of 1933 as amended, were challenged as being unconstitutional as written and as applied because they authorize a prior restraint on materials which are presumptively protected under the First Amendment of a kind condemned by the Supreme Court in an unbroken line of cases beginning with *Near v. Minnesota,* 283 U.S. 697 (1931) and continuing through *New York Times Co. v. United States,* 403 U.S. 713 (1971) and *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971) and others. Georgia Code Ann. §26-2103 was also attacked as denying due process and equal protection in that the statute makes a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of a single, isolated transaction as to only one of possibly thousands of presumptively protected publications and materials without any showing of traditional elements necessary to constitute a continuing public nuisance. This labelling of a business as a public nuisance on the basis of a single isolated transaction was also attacked as creating an invalid presumption of the type condemned by the United States Supreme Court in *Leary v. United States,* 395 U.S. 1532. It was further attacked as denying Fifth and Fourteenth Amendment rights to have every element making up a nuisance to be proven by competent evidence, in a First Amendment context, beyond a reasonable doubt.

The state court action was brought by the District Attorney of the Atlanta Judicial Circuit pursuant to authority granted him in Title 72, Georgia Code of 1933 to institute proceedings to abate a continuing public nuisance. The Solicitor of the Criminal Court of Fulton County joined the state court action as a plaintiff and is an Appellee herein even though no statutory or other authority exists for the Solicitor to act for the public to abate a nuisance.

The Harem Book Store, operated by Appellant Speight on premises leased to Appellant Chandler, is located at 2979 Campbellton Road, S.W., Atlanta, Georgia, on property zoned C-2 commercial; a classification which includes a retail bookstore. The Harem Book Store is engaged in the sale and offering for sale of books, magazines, newspapers, movie films, and other materials which are presumptively protected under the First Amendment to the Constitution of the United States, pursuant to applicable City of Atlanta business licenses.

The publications offered for sale by the Harem Book Store are comparable to those declared not to be obscene by the Supreme Court and many inferior Federal Courts, as well as state appellate courts, and hence, are protected expression under the First Amendment to the United States Constitution. No sales or offerings are made to persons under eighteen years of age (minor) of any of the adult-type publications or materials distributed by the Harem Book Store, nor are they "pandered" in the Ginzburg-sense, nor are the materials sold in such a way that unwilling persons cannot avoid them. (See *Miller v. California,* 37 L.Ed. 2d at page 427.)

No persons have been convicted for distributing obscene materials upon the premises of the Harem Book Store. The trial of one employee on such charges resulted in a mistrial when the jury was unable to reach a verdict. No publication sold or offered for sale at the Harem Book Store has been adjudicated obscene, either as of the time of the Opinion and Order of Court on February 22, 1973, or now.

At the hearing on Appellants' Motion for a Preliminary and Permanent Injunction several publications which had been purchased by adult agents of the Solicitor's office were tendered into evidence and were ruled inadmissible. Some of these were those upon which a conviction could not be obtained in the earlier criminal prosecution.

The three-judge panel produced three opinions. The two District Judges rules that the propriety of federal intervention in these circumstances has been decided by the Fifth Circuit Court of Appeals in *Paliao v. McAuliffe*, 466 F.2d 1230 (5th Cir. 1972) and therefore, since the state court action was not brought in bad faith[1] or for purposes of harassment and Appellants did not present any "special circumstances which would justify federal intervention," the complaint must be dismissed. The concurring opinion of District Judge O'Kelley stated that, in order for the federal court to intervene, there must be no adequate remedy or appellate process in the state courts.

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[1] Bad faith was alleged by Appellants and facts supporting that allegation were presented. Paragraphs 18 through 20 of the Complaint read as follows:

"18.

Defendants knew or should have known that no violation of Georgia statutes, to-wit: Georgia Code §26-2101, has been

Circuit Judge Morgan dissented, having found the statutes herein involved susceptible to no saving construction and

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(Footnote 1 Continued)

alleged and proved in any court of law against Plaintiffs herein, or any of their agents, servants, and employees, relating to the Harem Book Store located at 2979 Campbellton Road, S.W., Atlanta, Fulton County, Georgia, prior to the institution of the Complaint attached hereto and identified as Exhibit 'A'.

"Further, Plaintiffs, affirm that in a criminal prosecution charging Plaintiff James L. Chandler, brought in the Criminal Court of Fulton County, by the agents, servants, and employees of Defendant McAuliffe charging violation of State of Georgia Obscenity law, after a trial of three (3) days, a mistrial was declared by the Honorable Daniel Duke, Judge, because the jury was unable to reach a unanimous verdict. (The jury remained in deadlock at four (4) to one (1) in favor of acquittal.)

"19.

The resort to utilization of the concept of public nuisance authorized by Georgia Statutes by the Defendants in order to shut down the Harem Book Store and forbid press materials to be sold there as well as seeking the forfeiture and destruction of all the press materials contemporaneously being offered for sale at said store, without regard to whether or not each and every single publication can be said to be obscene in the constitutional sense, and indeed, the said Complaint, as sanctified by verification, states, in part, as follows:

> 'Said books, magazines and motion picture films and said imitation penises and phallic objects constitute one stock of merchandise all of which is pandered as being in the nature of hard-core pornography and the major portion or a substantial portion of such stock of merchandise is such hard-core pornography, and plaintiffs say that the entire stock of merchandise is accordingly subject to condemnation and forfeiture.' (Exhibit "A", p. 3)

and rejecting the "civil proceeding used to enforce criminal laws" rationale of *Palaio v. McAuliffe*, supra.

The majority of the three-judge court finding that *Younger v. Harris*, 401 U.S. 37 (1971) and its companion cases, as interpreted by the Fifth Circuit in *Palaio v. McAuliffe, supra*, required non-intervention, the injunction was denied, the action was dismissed and this appeal follows.

SUMMARY OF ARGUMENT

This Court for more than forty years has instructed the judiciary both state and federal that it is not possible to safeguard the precious *First Amendment* rights by permitting injunctive restraints upon the free exercise thereof utiliziing overbroad statutes including nuisance statutes, *Near v. Minnesota*, 283 U.S. 697 (1931) as well as enjoining future dissemination. As so aptly put by Mr. Chief Justice Hughes, *283 U.S. 697* at 713, "This is the essence of censorship."

There are extensive parallels in *Near* and the case presently before the Court. Both were subject of a civil nuisance statute enforceable by injunction and contempt proceedings permitting prior suppression of future dissemination. Also both were subjected to preliminary injunctive sanctions.

With this clear mandate, followed from that time forward in multiple decisions, we find a state Court operating under a strikingly similar statute invoking the remedies found to be so abhorrent in *Near*.

The Complaint filed in the within proceedings demonstrates to the Court the potential of irreparable injury

necessary to invoke the jurisdiction of the federal forum to litigate federal constitutional rights. However, the majority of the statutory three-judge court found that the principles of *Younger v. Harris,* supra and *Samuels v. Mackell,* supra, mitigated against that court in going beyond the question of jurisdiction to decide the substative legal issues involved.

Younger v. Harris seems to say that in criminal cases no injunctive relief can be granted by a federal court interfering in a State criminal proceeding unless there are circumstances present which dictate irreparable injury to the parties or circumstances which indicate bad faith enforcement of the law and/or harassment by State authorities.

The court did not reach the question in *Younger* as to whether the same rationale would apply to State court civil proceedings instituted prior to the attempt by a party to invoke jurisdiction of the federal forum, or under what circumstances the federal forum may intervene to enjoin State court civil proceedings and whether those proceedings are governed by the same requirements of *Younger v. Harris.*

This case presents the potential for this Court to enter into a resolution of those questions and problems.

ARGUMENT

This Court is now considering the following question in *Steffel v. Thompson,* No. 72-5581:

> "Did the Court below correctly apply the *Younger v. Harris,* 401 U.S. 37 (1971) and *Samuels v. Mackell,* 401 U.S. 66 (1971) standards to deny petitioner *declaratory relief* in a situation which did not involve a pending State criminal prosecution?"

This case was argued before the Court on November 13, 1973 and according to published reports the questioning of the Court related to whether or not the principles of *Samuels v. Mackell*, 401 U.S. 66 (1971) bar declaratory judgment intervention when no prosecution is pending and the attack is on a statute "as applied." Mr. Justice White also raised the question that if that were so, would there not also be a case or controversy problem which may bar declaratory relief.

The question presented in the case at bar relates to whether or not the *Younger v. Harris*, supra and *Samuels v. Mackell*, supra requirements apply to deny petitioners *injunctive and declaratory relief* in a situation which did not involve a pending State criminal prosecution.

Thus, this case presents, as *Steffel v. Thompson* did not present, the factor of injunctive relief with regard to the unconstitutionality of the State statute both as written and as applied. Circuit Judge Morgan in his dissenting opinion beginning at p. A. 7 of the Jurisdictional Statement, sets forth his evaluation of the statute and its patent unconstitutionality.

Hence, as stated before, the case at bar involves two factors not present in *Steffel v. Thompson:*

(1) In this case injunctive relief was sought, whereas in *Steffel* declaratory relief was sought;

(2) The statute is challenged as unconstitutional both as written and as applied, whereas in *Steffel* it was only challenged as applied.

Thus, we contend that the decision of this Court in the case of *Steffel v. Thompson* may not adequately answer the question posed by counsel.

This case raises important issues regarding whether a showing of irreparable injury or other extraordinary circumstances is required in order for a federal court to grant injunctive and declaratory relief in cases which involve a pending state civil proceeding but do not pose a threat to state criminal prosecutions. This question was not expressly decided by *Younger v. Harris, supra*, which itself dealt with a criminal case. Mr. Justice Black wrote,

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. 41.

The concurring opinion of Mr. Justice Steward in *Younger v. Harris*, 401 U.S. at 55, in which Mr. Justice Harlan joined, makes clear the limited nature of the holding in that case:

> "... [s]ince all these cases involve state criminal prosecutions, we do not deal with the considerations which should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently."

However, the majority of the three-judge court in the case at bar, while recognizing explicitly the fact that *Younger v. Harris*, supra, and its companion cases did not decide the issue, felt bound by *Palaio v. McAuliffe*, 466 F.2d 1230 (5th Cir. 1972) and the following language therein:

> "We believe, however, that application of the principles of *Younger* should not depend upon such labels as 'civil' or 'criminal', but rather should be

governed by analysis of the competing interests that each case presents (and) when federal anticipatory relief will significantly affect a state's enforcement–by whatever means–of its criminal laws, then such relief is barred by the strong policy of noninterference, unless the plaintiff can meet the heavy burden of proof that *Younger* imposes."

"We thus pose a limited answer to the question expressly reserved in *Younger, supra,* by holding that, *where plaintiff is unable to prove the existence of 'special circumstances,' the principles of Younger bar federal intervention in a state civil proceeding that is an integral part of a state's enforcement of its criminal laws.*" (Emphasis supplied.)

1. *Palaio v. McAuliffe, supra,* is incorrect in its reasoning and its holding, and, in any event, is not applicable to the present case. In that case, the Solicitor General of the Criminal Court of Fulton County, Georgia, instituted proceedings in the Fulton County Superior Court to have two named motion pictures declared obscene and subject to seizure. Shortly before the date set for the state court hearing Palaio and others filed complaints in federal district court seeking injunctions against pending and future criminal and civil proceedings against them and a declaration that the procedures employed in the state court suit were constitutionally invalid. On March 17, 1971, after the state judge had found probable cause for declaring one of the motion picture films obscene and after the state criminal prosecution of the appellants in *Palaio v. McAuliffe, supra,* had begun, the federal district judge concluded that the suit to declare the motion pictures subject to seizure was a good-faith effort by Georgia officials to enforce Georgia criminal laws, and accordingly held that dismissal was dictated by *Younger v. Harris, supra.*

By the time the appeal reached the Circuit Court of Appeals the criminal prosecution was pending and the Fulton Superior Court had been affirmed by the Supreme Court of Georgia on October 7, 1971, in *1024 Peachtree Corp. v. Slaton,* 228 Ga. 102, 184 S.E.2d 144.

The Circuit Court of Appeals agreed with the characterization by the Supreme Court of Georgia of the suit to declare the film subject to seizure as a part of Georgia's program of enforcing its criminal laws. It pointed out that a three-judge federal court has suggested such suits might afford a method of obtaining the constitutionally required adversary hearing prior to the arrest and prosecution of one for the sale of allegedly obscene materials. *Gable v. Jenkins,* N.D. Ga. 1969, 309 F.Supp. 998, aff'd. per curiam, 397 U.S. 592 (1970). This ignores the compulsory self-incrimination aspects of such a proceeding which forces one to furnish a film to the court as the beginning of a prosecution for exhibiting that same film.

The Circuit Court of Appeals also relied upon language by the Supreme Court in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 437 (1957) recognizing that such civil suits "supplement the existing conventional criminal provisions dealing with pornography." However, the quoted portion did not refer to "such civil suits." Instead, it referred to §22-a of the New York Code of Criminal Procedure (L. 1941, C. 925), as amended in 1954 (L. 1954, C. 702). Section 22-a of the New York Code of Criminal Procedure was upheld because it had procedural safeguards. The Georgia procedure has none.

In a case similar to this one, decided after *Younger v. Harris,* supra, and its companions, this Court ruled that 42

U.S.C. §1983 is an exception to the Anti-Injunction Statute, 28 U.S.C. §2283, *Mitchum v. Foster*, 407 U.S. 225 (1972). The dissent of Chief Justice Burger, in which Justices White and Blackman joined, urged the district court on remand to consider

> "whether general notions of equity or principles of federalism similar to those invoked in Younger, prevent the issuance of an injunction against the state 'nuisance abatement' proceedings in the circumstances of this case." *Id.* at 244.

The majority of the three-judge court cited the above language but it is doubtful that the majority of this Court in *Mitchum* could have reached the 42 U.S.C. §1983 issue, after its earlier ruling in *Younger*, had the majority not thought intervention might be appropriate in a case such as this involving prior restraint if the Anti-Injunction statute did not present an absolute bar.

As pointed out by Circuit Judge Morgan, in his dissent, civil proceedings result in the loss of certain protections which are available in a criminal proceeding. Among these are trial by jury and proof beyond a reasonable doubt, to name but two.

Assuming, *arguendo*, that the "civil as basically an enforcement of criminal law" theory of *Palaio, supra*, is correct, that is not the case here. While all the materials proffered by the state into evidence are or have at one time been the basis of criminal prosecutions against individuals, the disposition of the instant case will not, in the words of *Palaio, supra*, "significantly affect a state's enforcement – by whatever means – of its criminal laws." 466 F.2d 1230 at

1233. The pending criminal prosecutions will remain pending no matter what the disposition of this case. Thus the instant case cannot be characterized as civil enforcement of criminal laws. Appellee's complaint requested the following:

> "(a) . . . injunctions, both temporary and permanent, against the conduct and operation of the Harem Bookstore . . . by any person; and
>
> "b" . . . an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with the advertising, sale and exhibition for sale of said merchandise, to be contraband and to be forfeited and destroyed."

That this is an impermissible prior restraint of constitutionally protected materials is obvious and will be discussed hereinafter. Here, however, its inclusion is to show that what is being sought here is qualitatively and substantively different from what took place in *Palaio, supra,* and, *Palaio* is not controlling.

2. The decision of the three-judge district court is in conflict with the decision of this Court in *Lake Carriers Association v. MacMullan,* 406 U.S. 498 (1972) in which it was held that abstention was not required by *Younger v. Harris, supra,* and its progeny in an action for injunctive and declaratory relief against the enforcement of the Water Pollution Control Act of the State of Michigan. The statute provided, *inter alia,* that a violation of its provisions would be punished as a criminal misdemeanor. 406 U.S. at 502. The three-judge court involved there held that the complaint failed to state a justiciable controversy and that compelling reasons justified federal abstention.

This Court found a constitutionally relevant justifiable controversy but that abstention was appropriate. However, all but one of the District Court's grounds for abstention were rejected. This Court held that abstention was appropriate because the state court could settle the question of a correct construction of the new act, and possibly avoid the federal question once federal regulations were promulgated.

To reach that decision this Court was compelled to consider the implications of *Younger v. Harris* and *Samuels v. Mackell*. Mr. Justice Brennan found that the stringent post-prosecution tests are inapplicable to a case in which there was no criminal prosecution which was to be enjoined:

> In *Younger v. Harris*, 401 U.S. 37 (1971), and *Samuels v. Mackell*, 401 U.S. 66 (1971), this Court, held that, apart from 'extraordinary circumstances,' a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on consideration of equity practice and comity in our federal aystem that have little force in the absence of a pending state proceeding. In that circumstance exercise of federal court jurisdiction is appropriate if the conditions for declaratory or injunctive relief are met. See generally *Perez v. Ledesma*, 401 U.S. 82, 93 (1971) (separate opinion)." 406 U.S. 498, at _____

The separate opinion referred to is that of Mr. Justice Brennan himself. Since this Court has held that the stringent *Younger v. Harris* and *Samuels v. Mackell* tests do not apply in a suit prior to or not involving criminal prosecutions then the decision of the District Court in this case conflicts with *Lake Carriers Assoc. v. MacMullan, supra.*

3. The decision appealed from is in conflict with the principles enunciated by this Court in *Gibson v. Berryhill*, ___ U.S.___, 36 L.Ed.2d 488 (1973). In that case, Berryhill and others were licensed optometrists employed by Lee Optical Co. and were not members of the Alabama Optometric Association because membership therein was limited to optometrists practicing privately. They were charged by the Association with unprofessional conduct within the meaning of the state optometry statute because of their employment with the company. The complaint was filed with the Alabama Board of Optometry (board) all members of which were Association members. Two days thereafter the Board brought its own suit in state court against the optometrists and their employer, Lee Optical, to enjoin the company from practicing optometry. The action before the Board was stayed pending the outcome of the state court action. The charges against the individual defendants were dismissed but the state trial court enjoined Lee Optical from engaging in the practice of optometry. The company appealed. The Board, in the meantime, revived the Association's charges against Berryhill and the other appellees, who sought an injunction in the Federal District Court under the Civil Rights Act claiming that the Board was biased. The District Court enjoined the Board proceedings but thereafter the State's highest court reversed the state trial court and held that the optometry law did not prohibit a lecensed optometrist from working for a corporation. Thereafter, the Board appealed to the Supreme Court. This Court held that neither the rule of *Younger v. Harris*, 401 U.S. 37 or principles of comity required the District Courts to dismiss the suit in view of the pending Board proceedings. The reasoning that compelled the conclusion that intervention was proper despite the pending actions is applicable here.

This Court unanimously held that a predicate for a *Younger v. Harris* dismissal is "the opportunity to raise and have timely decided by a competent state tribunal the federal issued involved." 41 L.W. 4580. A competent tribunal was not present in *Gibson v. Berryhill* because the State Board of Optometry was incompetent by reason of bias to adjudicate the issues before it. 41 L.W. 4581.

The remaining predicate for a *Younger v. Harris* dismissal – the opportunity to raise and *have timely decided* the federal issues involved – is not present.

Under Georgia law injunction cases are exempt from the automatic supersedeas provisions of §8 of the Appellate Practice Act of 1965. The burden rests upon the appellant to obtain such order, pursuant to §62(c) of the Civil Practice Act (Georgia Code Ann. §81A-162(c)) to obtain such order as will protect his rights and preserve the status quo during the pendency of the appeal. *Howard v. Smith*, 226 Ga. 850 (1970). The provision of the Civil Practice Act referred to above provides, in pertinent part, that when an appeal is taken from an interlocutory or final judgment granting an injunction, the court in its discretion may suspend the injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. §81A-162(c) This procedure in cases involving the application of the First Amendment and a prohibited prior restraint is contrary to the holdings of this Court in *Freedman v. Maryland*, 380 U.S. 51, *Blount v. Rizzi*, 400 U.S. 410; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, among others.

This means that a prior restraint either in the form of a bond "or otherwise" or closure of the bookstore pending appeal is expressly authorized by Georgia law pending an

appeal. Equally obvious is the potentially prohibitive cost of an appeal and the resulting tendency to self-censorship lest an entire business be lost because one volume of a book or one issue of a magazine may trigger nuisance abatement proceedings. *Cf. Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963).

Because of the above facts irreparable harm would be present in letting the state court adjudicate the issues involved in the instant case as surely as it was present in *Gibson v. Berryhill, supra,* in which the tribunal was incompetent because of bias.

4. The decision of the three-judge district court is in conflict with the result of the decision of a three-judge court in the Western Division of the United States District Court for the Northern District of Ohio in *Pursue, Ltd. v. Huffman,* _____ F. Supp. _____ No. C 72-432, decided April 20, 1973. In that case a suit was brought under 42 U.S.C. §1983 seeking injunctive relief and declaratory judgment against the assertedly unconstitutional provisions of the Ohio nuisance statute, O.R.C. §§3767.01, et seq., as it pertains to the exhibition of obscene movies. Huffman, Prosecutor of Allen County, Ohio, filed a civil complaint seeking a temporary and permanent injunction closing the Cinema I Theatre in Lima, Ohio, on the grounds that obscene movies were being shown therein in violation of applicable statutes. After a hearing on Huffman's motion for a temporary injunction the Court entered an order closing the theatre for an indefinite period. A complaint was filed in the district court and the district court stayed the state court injunction, but only to the extent that that injunction forbade the showing of films which had not been held to be obscene in a prior adversary hearing.

Thereafter, Huffman applied for a hearing for the purpose of conducting a prior adversary hearing on films not yet reviewed and to consider his application for a permanent injunction against the theatre. The Court ordered the theater closed for one year unless released by order of the Court pursuant to compliance by the owners of the theater with certain statutory requirements.

Pursue, Litd., as successor in interest of the original leaseholder, filed a complaint in the district court seeking a temporary restraining order and preliminary and permanent injunctive relief against the state court judgment and declaratory judgment respecting the asserted unconstitutionality of the Ohio statute. Without even discussing the issues of abstention or comity the three-judge court asserted jurisdiction and held the Ohio statute to be an impermissible prior restraint on First Amendment rights and therefore unconstitutional. Obviously, as did Circuit Judge Morgan in the instant case, that panel had no difficulty in finding irreparable harm in the closing of the place of business.

The *Pursue, Ltd.* case is not unknown to this Court, in that the following has occurred with respect to said case:

A. On or about May 23, 1973 Petitioners Huffman and Fair filed the following documents in this Court:

(i) Motion for Leave to File Petition for Writ of Mandamus or Prohibition, Petition for Writ of Mandamus or Prohibition, and Brief in Support Thereof; Docket No. 72-1613 Misc.

(ii) Motion to Advance Date Set for Filing of Briefs in Opposition to Petition;

(iii) Application to Honorable Potter Stewart for Stay Order or Writ of Injunction.

B. On June 12, 1973, Petitioners' Application for Stay, No. A-1199, presented to Mr. Justice Stewart, was denied.

C. On June 25, 1973 this Court entered the following order in the instant matter:

> "The application for stay or writ of injunction presented to Mr. Justice Stewart and by him referred to the Court and the motion to advance are denied. The motion of Pursue, Ltd., to participate as a party respondent is granted."

D. On or about July 5, 1973 James J. Clancy, Attorney for Petitioners applied to the Court for an extension of time (No. A-53, Re: *Huffman, et al v. Pursue, LTD*) in which to docket an appeal from the opinion and order of April 20, 1973.

E. On July 9, 1973 Mr. Justice White signed an order extending the time for docketing an appeal to and including August 14, 1973.

F. On or about August 14, 1973 a Jurisdictional Statement was filed in this Court appealing the Opinion and Order of the statutory three-judge court on April 20, 1973, docketed as *Huffman et al v. Pursue, LTD* No. 73-296 on this Court's calendar which Jurisdictional Statement is for the most part identical in substance to the Petition for Writ of Mandamus or Prohibition.

G. On September 17, 1973 Pursue, LTD, Respondent herein, filed a Motion to Dismiss or Affirm, and no action has been taken by the Court in No. 73-296.

H. On or about October 23,, 1973, *Pursue, Ltd.* as respondent filed a Response in Opposition to Petition for Writ of Mandamus or Prohibition in case No. 72-1613 Miscallaneous.

I. On or about November 12, 1973 this Court denied the Petition for Writ of Mandamus or Prohibition in No. 72-1613.

5. There is no remedy available to Appellants in the state courts of Georgia. The majority opinion points out that "plaintiff consistently responded at the three-judge hearing that he could raise the same issues of constitutionality in the Georgia state courts." This is true. It is also true that the decisions of the Supreme Court of Georgia have already approved the use of the public nuisance approach to the regulation of "obscene" materials. In *Evans Theatre Corporation v. Slaton,* 227 Ga. 377 (1971) the Supreme Court of Georgia held that

> "the State has an interest in the welfare, peace and good order of its citizens and communities, and that an action may be maintained at the instance of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws." 227 Ga. 377 at 382.

The decision in *Evans Theatre Corporation v. Slaton, supra,* was prior to the passage of the legislation relied upon by the Appellees who admitted at oral argument that the challenged Code section was drafted with reliance upon that case. There

is no reason to believe that the Supreme Court of Georgia will not authorize under a statute what it approved in the absence of one. See also *Walters v. Slaton* 227 Ga. 676 (1971).

6. The substantive issue involved on the merits is of paramount importance and its resolution is necessary by this Court in view of the place occupied by the Free Speech and Press provisions of the First Amendment in a democracy. Moreover, the closing of a bookstore under the guise of abating a public nuisance is a constitutionally impermissible prior restraint and violates the First, Fifth, and Fourteenth Amendments to the Constitution of the United States.

Appellees Slaton and McAuliffe, in their Complaint to close the Harem Book Store as a public nuisance, made it quite clear that they do not seek merely the cessation of what they view as illegal activity on the premises (i.e., the possession, for sale, of obscene materials), but have asked for temporary and permanent injunctions against the further operation of the Harem Book Store.

It has been well recognized by this Court that "a State is not free to adopt whatever procedures it pleases for dealing with obscenity ... without regard to the possible consequences for constitutionally protected speech." *Marcus v. Search Warrant,* 367 U.S. 717, 731 (1961).

> "The *First Amendment* requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line ... Our insistence that regulations of obscenity serupulously embody the most vigorous procedural safeguards ... is ... but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks ...'. *Bantam Books v. Sullivan,* 372 U.S. 58, 66 (1963)." *Blount v. Rizzi,* 400 U.S. 410, 416, 417 (1971).

See also: *Heller v. New York*, ____ U.S. ____, 37 L.Ed.2d 745 and *Roaden v. Kentucky*, ____ U.S. ____, 37 L.Ed.2d 757.

Moreover, this Court has made it clear that since

> "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn . . . [t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

Appellees Slaton and McAuliffe, under their planned use of the nuisance concept, do not plan to separate protected from unprotected speech; they merely seek to prevent all kinds of speech, at the Harem Book Store, by closing its doors forever by labelling it a public nuisance.

As did the system condemned in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this method of obscenity regulation conveniently makes recourse to the criminal process unnecessary.

"Any prior restraint on expression comes to [the Supreme Court] with a 'heavy presumption' against its constitutional validity. *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968), *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

In considering the validity of an injunction forbidding the distribution of "any literature" by the petitioners, the Supreme Court, in *Organization for a Better Austin v. Keefe*, noted that

> "in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near v. Minnesota*, 283 U.S. 697 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on *First Amendment* rights. Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." *Organization for a Better Austin v. Keefe*, 400 U.S. 415, 419 (1971).

The only difference between that case and the instant case is that the population of Atlanta and Fulton County is several times that of the City of Westchester, Illinois, the one referred to above and hence, a far greater number of people will be deprived of access to materials which are presumptively protected by the *First* and *Fourteenth Amendments* to the *Constitution of the United States*.

The proposed injunction, it should be noted, does not enjoin the sale or distribution of specific materials shared as "obscene" instead, by closing the store, it enjoins the sale of any press materials whether obscene or otherwise. The Court of Appeals for the Fourth Circuit has recently recognized that

> "the Supreme Court has made it clear that laws which regulate activities protected by the First Amendment must be more than merely rational, and are not accorded the presumption of constitutionality normally accorded to acts of the legislature. *United States v. Congress of Industrial Organization*, 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948)." *United States v. Crowthers*, 456 F.2d 1074, 1080.

The Court went on to hold that to abridge activities protected by the *First Amendment*,

> "the government must have a compelling interest to justify the abridgment and the scope of the abridgment must not be greater than reasonably necessary to serve the government's purpose. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945)." *United States v. Crowthers, supra*, at 1080.

The idea advanced above, sometimes referred to as the "less drastic means" doctrine, requires that

> "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purposes." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

The Fifth Circuit has noted that in the area of *First Amendment* freedoms,

> "the overbreadth doctrine plays an important role, for it requires the legislature to focus narrowly on the particular evils it wishes to combat when speech is at stake," *Hobbs v. Thompson*, 448 F.2d 456, 470 (1971).

In *Roth v. United States*, 354 U.S. 476, 488 (1957), the decision upholding the right to regulate obscenity, it was said:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being

> of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."

The cases cited above make clear that the blunderbuss approach to the regulation of obscenity represented by declaring the premises or the store to be a nuisance (even assuming valid, final convictions for violation of obscenity statutes thereon in the past) cannot be made to conform to the standards of the *First, Fifth* and *Fourteenth Amendments.* First, there is an adequate remedy at law for violations which have occurred in the past, *i.e.*, the criminal penalty. Second, declaring the business to be a nuisance does not comport with the less drastic means test because it completely prevents the dissemination of even protected materials. Third, a lesser measure, an injunction against the dissemination of "obscene" materials, would operate as a prior restraint, would induce self-censorship, and would not give such notice as to what conduct was prohibited as to be enforceable. In addition, it would place the bookseller in the position of having to prove that he was not violating the injunction by proving the offending material is, in fact, protected. This is, of course, also contrary to established doctrine that the burden of proof is upon the censor. *Speiser v. Randall,* 357 U.S. 513 (1958). Fourth, there are no safeguards by which a judicial decision as

to whether the materials are, in fact, protected will be forthcoming within any stated period of time, thus ensuring a restraint of only such duration as is necessary for sound judicial resolution of the issues. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and *Blount v. Rizzi*, 400 U.S. 410 (1971).

The decision of the Supreme Court of the United States in *Near v. Minnesota*, 283 U.S. 697 (1931), makes very clear the vice of the Appellees proposed procedure against Appellants wherein it states, at page 713:

> "If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter – in particular that the matter consists of charges against public officers of official dereliction – and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship."

The same judgment, that the operation and effect is "the essence of censorship", is appropriate here.

In a later portion of the opinion, the Court answered the argument that the statute dealt not with publication *per se*, but with the business:

> "In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the 'business' of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constituional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made." *Near v. Minnesota, supra,* at 720.

In 1962, the Supreme Court had before it the case of *Manual Enterprises, Inc. v. Day*, 370 U.S. 478. That case concerned the proper construction of *18 U.S.C.* §*1461* and its application to the nude male magazines involved therein. The concurring opinion at 370 U.S. 503, 504 of Mr. Justice Brennan, speaking for himself, Mr. Chief Justice Warren, and Mr. Justice Douglas, dealt with the possible constructions of the statute, which dealt with regulation of obscenity through the mails:

"There are two possible constructions of §*1461* on the basis of this brief Senate discussion. One possibility is that short of breaking seals, the postmasters could remove matter which they thought from its face or the name of its sender to be obscene. The second construction is that postmasters could remove matter but only to turn it over to the appropriate authorities as the proposed subject of a criminal prosecution – and also of course after that material had been determined, in a criminal trial of its sender, to be obscene. Support for this second construction is found not only in the brief 1865 Senate consideration itself but also in an 1888 statute amending §*1461*, and enacting a second banning material with obscene matter on its face and – unlike §*1461* – explicitly providing that it 'shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe.'

"The 1865 Senate discussion is not unambiguous, but I cannot suppose that Senator Johnson – who had already noted his awareness that much obscene material was discoverable without breaking seals, and even so, his determined opposition to its being stopped – would have accepted Senator Sherman's suggestion had he understood it to mean more than that the Post Office could stop obviously questionable matter for the purpose of transmitting it to prosecuting authorities, could stop matter already held obscene if it were sent again, and could investigate matter sent by persons previously convicted and, if the matter were found violative, could present it to the prosecuting authorities. I believe this is the correct construction of the 1865 enactment. But at least *it is arguably correct, and necessary if we are to avoid the section's probable constitutional infirmity (see Near v. Minnesota, 283 U.S. 697, 75 L.Ed. 2d 1357, 51 S.Ct. 625;*

Summerfield v. Sunshine Book Co., 95 App.D.C. 169, 221 F.2d 42) if construed as a provision allowing the Postmaster General to exclude all matter sent by a person who had previously sent violative matter." (Emphasis supplied.)

This reasoning compels the conclusion that not only may materials not be proscribed which have not been judicially found obscene, but also that even assuming that a valid conviction has been obtained as a result of the sale of obscene material at a given location, it is not constitutionally permissible to put a blanket prohibition on further sales of any materials.

The validity of the reasoning and approach of the Supreme Court in *Near* is more apparent now than ever before. The Appellants herein who have not ever proven violations of the law arising out of the business of the subject bookstore are engaged, purely and simply, in attempted censorship and suppression of materials which they cannot establish are unlawful, but which they personally find offensive. This Court, charged as it is with the duty of preventing erosions of those fundamental freedoms which set this country apart from all others, should not countenance such tactics.

Case law involving the suppression or attempted suppression of allegedly obscene materials on nuisance grounds is scant and not uniformly consistent. Nevertheless, the better reasoned opinions prohibit the kind of relief sought by the Appellees in their action.

A recent case, and one directly in point on the merits, is *Pursue, Ltd. v. Huffman,* ____ F. Supp. ____ (No. C72-432, U.S.D.C.N.D. Ohio, decided April 20, 1973), discussed above. In that action a permanent injunction was issued against the enforcement of a state court order closing an Ohio theatre as a nuisance pursuant to an Ohio statute. The decision held that the statute and its application to the theatre constituted an overly broad prior restraint upon First Amendment rights.

In another case out of the U.S. District Court for the Western District of Tennessee, Western Division, entitled AIRWAYS THEATRE, INC. and SOUTHLAND THEATRES, INC., Plaintiffs, v. PHILIP M. CANALE, District Attorney General, DAVID M. PACK, Attorney General of Tennessee and WINFIELD DUNN, Governor of the State of Tennessee, Civil C-73-262, filed November 19, 1973, the court held that Tennessee's nuisance statute was unconstitutional. The statute was held to be unconstitutional by this unanimous three-judge panel for at least two reasons; one of which related to the definition of places of nuisance, which could be applied to include one's home and secondly, that

> "seizures of press materials, fixtures, furnishings and equipment and stock used in or in connection with the maintaining or conducting of a nuisance, shall be subject to seizure immediately upon detection by any law enforcement officer ... thus, once there is a determination of obscenity by a law enforcement officer, seizure of the property may take place."

The three-judge court held that the procedure flew in the face of the decision of the U.S. Supreme Court in *Roaden v. Kentucky, supra.*

Several state courts have reached the same conclusion. In *New Riviera Art Theatre v. State,* 412 S.W. 2d 890 (Tenn. 1967), the Supreme Court of Tennessee construed a statute under which the District Attorney General of the Sixth Judicial District of Tennessee sought a temporary injunction enjoining the Defendants from showing or disposing of a film entitled "London Night Life" or other such film, or acquiring such other films. A permanent injunction was prayed for, after a hearing, and a determination the films complained of were obscene.

After a hearing, the Trial Court found certain named films to be obscene and decreed, at 892:

> "It is, therefore, ordered, adjudged and decreed, pursuant to the authority in Tennessee Code Annotated, Section 39-3005 (c) that the defendants, New Rivieria Art Theatre of Chattanooga, Inc., and H. W. Hill, be permanently enjoined from the further or future showing of the films and 'Coming Attractions' or 'Trailers' of the sort, kind or type which may be classified by the court as 'obscene material' under the definition of Tennessee Code Annotated, Section 39-3007."

The Appellants insisted first, that the statute in question did not authorize the granting of an injunction, temporary or permanent, enjoining the showing of any and all films by the parties sought to be enjoined. The Court agreed, stating that the statute comprehended injunctions only against obscene material and added, at 412 S.W. 2d 893, 894, the following:

"The granting of a temporary injunction prohibiting the defendants from showing any film had the effect of closing the theatre and was an unconstitutional application of the statute in violation of defendants' constitutional rights of freedom of speech and due process."

The Appellants also complained about the permanent injunction prohibiting defendants from showing other films and coming attractions or trailers of the sort, kind or type which may be classified by the Courts as obscene material.

The Court agreed:

"The statute does not authorize an injunction to restrain the acquisition and display of unidentified films, coming attractions or trailers which a court might in the future hold to be obscene. Such a construction of the statute would vest in the courts an unlimited power of prior restraint on the freedom of speech and press.

"Such an interpretation would also place the burden upon the defendants of determining whether any film they might acquire might be classified by the court as obscene material."

"The burden is on the District Attorney General to show the material sought to be enjoined from sale or display is unprotected by the first amendment to the constitution of the United States. *Freedman v. State of Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965).

> "We agree this portion of the decree is obviously in violation of the first, fifth and fourteenth amendments to the Federal Constitution. *Kingsley Books, Inc. v. Brown, supra.*" *New Rivieria Art Theatre v. State, supra,* at 895.

The Supreme Court of Florida, in *Mitchum v. Florida ex rel Schaub,* 250 So.2d 883 (1971), had occasion to consider a Trial Court's permanent injunction which was worded as follows:

> "ORDERED AND ADJUDGED that the Respondents cease and desist from selling, offering for sale or causing to be sold or offered for sale obscene or pornographic publications in violation of F.S.A. 847.011 . . . "

The Court condemned this order succintly and directly:

> "The 14th Amendment of the United States Constitution requires that regulation of obscenity conform to procedures that will insure against the curtailment of constitutionally protected expression or publication. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963). The operation and effect of the method by which sale of publications is to be restrained must be very carefully defined. Cf. *Speiser v. Randall,* 357 U.S. 513 (1958). We are of the view that a blanket injunction is constitutionally invalid because it does not put the seller on notice as to what is prohibited, and thereby creates an unacceptable restraint upon hisfreedom to vend publications. Cf. *Smith v. California,* 361 U.S. 147 (1959); *Freedman v. State of Maryland,* 380 U.S. 51 (1965). See, *New Riviera Art Theatre v. State,* 412 S.W. 2d 890 (Tenn. 1967)."

The Florida Court went on to note that a permanent injunction, reading as follows, had been entered by the Trial Court:

> "ORDERED AND ADJUDGED that the operation of the Adult Book and Movie Store at 1437 Main Street in the City of Sarasota, Florida, by said respondents constitutes the maintaining of a public nuisance and Matthew Rocks and Bob Mitchum are hereby enjoined from the further operation of or maintenance of said business premises so as to annoy the community and to become manifestly injurious to the morals or manners of the people."

This, too, was found to be unacceptable.

> "This injunction is also invalid. A business involved in the dissemination of publications cannot be declared a nuisance in this manner. See *Near v. Minnesota ex rel. Olson,* 283 U.S. 697 (1931)."

The Florida Court also pointed out that the procedure utilized by the State of Florida to condemn the entire contents of the bookstore was deficient. Three exhibits had been presented to the Trial Court and were used to condemn the entire contents of the bookstore on the theory that they were "representative".

The Court rejected this approach:

> "Unless a defendant is willing to stipulate that particular exhibits are absolutely representative of the stock offered the public, one copy of each item sought to be suppressed must be entered into evidence." *Mitchum v. Florida ex re. Schaub, supra.*

In rejecting the contention that one publication might be used to judge others not in evidence, the Court relied upon the Supreme Court's decision in *Marcus v. Search Warrant*, 367 U.S. 717 (1961). In that case, Missouri procedures for suppressing alleged obscenity were found to lack the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. The Court discussed the reliance by the Missouri Supreme Court on the Supreme Court's decision in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and found such reliance to be misplaced:

> "The differences in the procedures under the New York statute upheld in that case and the Missouri procedures as applied here are marked. They amount to the distinction between 'a "limited injunctive remedy," under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene,' *Kingsley Books, supra* (354 U.S. at 437), and a scheme which in operation inhibited the circulation of publications indiscriminately because of the absence of any such safeguards. *First*, the New York injunctive proceeding was initiated by a complaint filed with the court which charged that a particular named obscene publication had been displayed, and to which were annexed copies of the publication alleged to be obscene. The court, in restraining distribution pending final judicial determination of the claim, thus had the allegedly obscene material before it and could exercise an independent check on the judgment of the prosecuting authority at a point before any restraint took place. *Second*, the restraints in *Kingsley Books*, both temporary and permanent, ran only against the named publication; no catchall restraint against the distribution of all 'obscene'

material was imposed on the defendants there, comparable to the warrants here which authorized a mass seizure and the removal of a broad range of items from circulation."

At this point, Footnote 28 was referred to and it cites the refusal of the Trial Court in *Kingsley Books, supra,* to allow the Defendants therein to do as the Appellees wish to do in their proceeding against Harem Book Store:

"28. The trial judge in *Kingsley Books* refused to enjoin the distribution of future issues of the publication in question, stating: '[u]nless the work be before the court at the time of the hearing at which the injunction is sought, it is inappropriate to make a judicial determination with respect to it. In respect of this feature of the case, the plaintiff seeks a likely trespass upon a constitutionally protected area, and the court must reject that prayer.' 208 Misc. 150, 168, 169, 142 NYS 2d 735, 751. Cf. *Near v. Minnesota ex rel. Olson,* 283 U.S. 697 51 S.Ct. 625." *Marcus v. Search Warrant, supra,* at 735.

Thereafter, the Court pointed out other differences between the procedure in *Kingsley Books, Inc. v. Brown, supra,* and the Missouri procedure which are also relevant to the Georgia procedure:

"*Third, Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene. This Court expressly noted there that the State was not attempting to punish the distributors for disobedience of any interim order entered before hearing. The Court pointed out that

> New York might well construe its own law as not imposing any punishment for violation of an interim order were the book found not obscene after due trial. 354 U.S. at 443, note 2. But there is no doubt that an effective restraint – indeed the most effective restraint possible – was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor." *Marcus v. Search Warrant, supra,* at 735, 7356.

More recent cases have been consistent with the theory espoused by Appellees herein. In *State of Indiana ex rel Thomas J. Blee v. Mohney Enterprises, et al.*, 289 N.E. 2d 519 (Court of Appeals of Indiana), Petition to Transfer to the Supreme Court of Indiana denied May 14, 1973, the approach of Appellees Slaton and McAuliffe herein was rejected by the highest Courts of Indiana. In that case Blee had sought to enjoin the operation of an adult bookstore, operated by Mohney, as a nuisance. The trial court found for Mohney and Blee, on behalf of the State of Indiana, appealed.

Blee had contended that an Indiana statute deeming any building or place used for the purpose of lewdness, assignation or prostitution a nuisance applied to the operation of a retail bookstore selling allegedly obscene materials. He also had alleged that such operation constitutes a public nuisance enjoinable by a private citizen under I.C. 1971, 34-1-52-1; Ind. Ann. Stat. §2-505 (Burns 1967) which reads:

> "Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the

> comfortable enjoyment of life or property, is a nuisance, and the subject of an action."

Blee introduced into evidence several exhibits consisting of materials he and others had purchased at the bookstore. The Court, as had the trial court, did not pass on the contention that these materials were obscene.

The Court pointed out that what Blee sought to enjoin "is the dissemination by an adult bookstore, of *any* printed materials whatsoever, in Allen County" and that he did not seek to prohibit only the dissemination of specific, identifiable items.

The Court stated that any discussion of the issues tendered by Blee must be preceded by a determination whether such injunctive relief would be violation of the First Amendment to the Constitution of the United States.

After quoting *Roth v. United States*, 354 U.S. 476 (1957) and *Redrup v. New York*, 386 U.S. 767 (1967), the Court stated:

> "None of the above standards is broad enough to prohibit dissemination of materials which have not yet been printed.
>
> This decision must rest upon the firmly established principle reiterated in *Organization for a Better Austin v. Keefe* (1971), 402 U.S. 415, that an "injunction, so far as it imposes prior restraint on First Amendment rights." [And it is impermissible where it] operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature of 'any kind' . . . "

The requested injunctiom would be an impermissible prior restraint and the trial court's denial thereof was proper. We therefore do not reach appellant's other contentions.

Judgment affirmed."

Nor may the Defendantss herein be heard to say that the relief that they feel themselves entitled to in the suit sought to be enjoined herein is any different in substance from that described above. They seek,, not a determination that certain named publications are obsscene in the constitutional sense, but instead, they make demands for:

"1. Summons and an appropriate order for service of summons issued, and of all rules and orders.

2. For an interlocutory injunction:

(a) For injunctions, both temporary and permanent, against the conduct and operation of the Harem Book Store in and on the premises at No. 2979 Campbellton Road, S.W., in the City of Atlanta, Fulton County, Georgia, by any person.

(b) For an order declaring all merchandise on said premises, as well as all records, supplies, equipment and fixtures used in connection with advertising, sale and exhibition for sale of said merchandise to be contraband, and to be forfeited and destroyed.

3. That a Rule Nisi be issued instanter requiring the defendants named herein to show cause why the prayers of this complaint should not be granted."

The conclusion is inescapable that Appellees Slaton and McAuliffe are engaged in a concerted action to impose a total and complete prior restraint upon the dissemination of *any* publications or materials by the Harem Book Store without regard to its effect upon protected speech and the rights of the citizens of Georgia and of the United States to purchase materials presumed to be protected by the *First Amendment.*

The United States Supreme Court in the case of *Paris Adult Theatre I v. Slaton, et al,* ____ U.S. ____, 37 L.Ed.2d 446 held that a procedure which sought to condemn as obscene a single named film comported with constitutional requirements as the same procedure was applied in that case provided, the Court said, that the definition of obscene was not otherwise void for vagueness (the so-called *Roth-Memoirs* test) and incorporated by authoritative judicial construction or legislative enactment the standards set forth in *Miller v. California,* supra. In fact, at page 455, including footnote 4, the majority of the Court suggests that his procedure is emanately fair when undertaken in the context therein prior to the institution of any criminal proceedings, and that the procedure would be even more fair if the disseminator had an opportunity to question the obscenity of the materials in a declaratory judgment forum prior to dissemination. The language of the decision and the footnote makes it clear that the Court was examining the Georgia procedure as it related to the prohibition of a specific film and/or films, and not to a general total and complete restraint on all films, whether first determined to be obscene or not.

In fact, this Court suggests that all press materials are presumptively protected until there is a judicial determination of obscenity in the opinion of the majority in *Roaden v. Kentucky,* supra at p. 764-765. In this case we are dealing

with a Georgia statute which authorizes, independent of any criminal proceeding, the closing of a bookstore or theatre as a public nuisance. If such is allowed to occur, then those who disseminate and exhibit adult materials would have to engage in the kind of "self-censorship" that would result in a "chilling of speech" that would ultimately have the effect of depriving adults of our society from access to non-obscene books which deal candidly with the subject of sex – a mysterious and powerful force in society.

Thus, we think the special circumstances exist that justify this Court confining the principles of *Younger v. Harris*, supra and *Samuels v. Mackell*, supra to the specific holdings in those cases, and this Court should not permit the doctrine to be extended to encompass the category of proceedings which relate to State imposition of civil sanctions to defeat the jurisdiction of the federal forum to litigate federal constitutional rights.

The procedures sought to be utilized by Appellees herein are being utilized to close a bookstore without regard to its contents and thereby prevent further dissemination at that location of any publication to anybody, by any person.

Clearly, this impermissible prior restraint justifies relief in a federal forum when sought by a proper party. *Zwickler v. Koota*, 389 U.S. 241, 19 L.Ed.2d 444 (1967).

An amusing comment on this Younger problem was addressed by Judge Aldersit, concurring in *Roy v. Jones*, CA-3 (8/28, 1973) 42 LW 2158, wherein he stated as follows:

> "The fundamental equitable concepts of *Younger* must never be subordinated. Thus, one piece of the *Younger* factual complex must not become the

subject of controlling emphasis to the exclusion of the important legal principles constituting the rationale of the case. An example of this is the suggestion that the root premises of *Younger* do not lie where there is no on-going State proceeding. While the contempor-enity [sic] of the State action may indeed be extremely important, this is but one factor and this one factor must not be considered in vacuo ... if the presence of an on-going State proceeding is critical, so is the necessity of proving entitlement to an immediate injunction. So understood, there is a delightful 'Catch-22' quality about it all:

"Plaintiff: Aha, you can't apply *Younger* because there is no on-going State proceeding ...

"Defendant: Aha to you Sir; if there is no on-going State proceeding then why do you need an injunction? What's there to enjoin? ..."

CONCLUSION

The three-judge district court was incorrect in applying the *Younger v. Harris* and *Samuels v. Mackell* considerations to the Appellants' Complaint and Petition for Injunctive and Declaratory Relief because there was no criminal prosecution involved. The reliance upon *Palaio v. McAuliffe* was misplaced as that decision's "civil as basically enforcement of a criminal statute" rationale is clearly erroneous. Even assuming that the comity considerations do apply the threat of the closing of a bookstore provides the necessary special circumstances and irreparable injury to support injunctive and declaratory relief against the enforcement of statutes authorizing an impermissible prior restraint upon the distribution of materials conceded to be entitled to the protection of the First and Fourteenth Amendments to the Constitution of the United States.

This Court should reverse the dismissal of Appellants' action and direct the three-judge district court to proceed to a hearing on the merits.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1557

ALVIS G. SPEIGHT, t/a
HAREM BOOK STORE and
JAMES L. CHANDLER,

Appellants,

vs.

LEWIS R. SLATON, In his capacity as
District Attorney, Atlanta Judicial
Circuit, and HINSON McAULIFFE, In his
capacity as Solicitor General,
Criminal Court of Fulton County,

Appellees,

On Appeal from the United States District Court for the Northern District of Georgia

APPELLEES' BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1557

ALVIS G. SPEIGHT, t/a
HAREM BOOK STORE and
JAMES L. CHANDLER,

Appellants,

vs.

LEWIS R. SLATON, In his capacity as District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, In his capacity as Solicitor General, Criminal Court of Fulton County,

Appellees,

On Appeal from the United States District Court for the Northern District of Georgia

APPELLEES' BRIEF

OPINION BELOW

The opinion below is reported at 356 F. Supp. 1101 (N.D. Ga. 1973).

QUESTION PRESENTED

Whether a federal district court should grant injunctive and declaratory relief absent special circumstances where there is an ongoing state civil proceeding

that is an integral part of a state's enforcement of its criminal laws, the statute attacked has not been authoritatively construed by a state court, and all constitutional issues could be raised in defense of a single pending state proceeding.

STATEMENT OF FACTS

On August 21, 1972, appellees in their official capacity filed an action to abate a nuisance upon the authority of a new Georgia Code Section (26-2103; 26-2104) enacted in 1971 by the General Assembly of Georgia in an act which became effective on April 1, 1971. This statute has not been construed or passed upon by the Trial Courts or the Appellate Courts in the State of Georgia. The action to abate a nuisance, filed by the State was based on three separate sales of magazines alleged to be obscene and in violation of Ga. Code Ann. 26-2101 (Ga. Laws 1968 pp. 1249, 1302; 1971 p. 344). The materials were sold to state agents, there was no seizure. Three magazines sold on one of the three dates alleged in the state's complaint were the subject of a criminal action which had resulted in a mistrial prior to the filing of the nuisance complaint.

The Harem Book Store was not closed nor were any materials seized, nor were any such actions contemplated by the State until a hearing. A rule nisi was issued scheduling a show cause hearing at 9:30 A.M. on August 25, 1972. After the case was called for a hearing on the temporary injunction and the State announced ready, a copy of the removal action filed that morning in the District Court for the Northern District of Georgia was served on the Court. The Georgia Court then held the action until a hearing on the re-

moval could be had. Before the hearing on the removal action could be had the appellants herein filed a Civil Rights Action (42 U.S.C. 1983) asking for the convocation of a three judge court seeking injunctive and declaratory relief, and alleging that the Georgia obscenity and nuisance statutes were unconstitutional as written and as applied.

The single District Judge to whom the removal action had been assigned stayed action pending a decision by the three judge panel. After a hearing during which appellants consistently responded that they could raise the same constitutional issues in the Georgia State Court, the three judge panel found no special circumstances requiring intervention, dismissed appellants' suit and remanded the case back to the State Court.

Appellants thereafter appealed the ruling of the District Court to this Court.

ARGUMENT

The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance.

Georgia Code Annotated 26-2103 (Ga.L.1971 pp. 344, 345)

At the outset it must be brought to the Court's attention that the issues involved in the instant case—the constitutionality of Georgia Code Annotated 26-2103 (Ga. L. 1971 pp. 344, 345)—is now before the Supreme Court of Georgia in the case of Sanders v. Georgia Case # 28352, argued October 10, 1973. (One day after probable jurisdiction noted in the instant case). The decision of the Georgia Supreme Court, if

rendered before oral argument, will be immediately forwarded to this Court.

It is important to note the posture of this case when the three judge panel was required to decide the threshold question of federal intervention. The three judge panel was confronted with a complaint that attacked the General obscenity statute of the State of Georgia. (Ga. Code Ann. 26-2101) and the nuisance statutes (Ga. Code Ann. 72-101 et al) plus Ga. Code Ann. 26-2103 set out above. Miller v. California — U.S. — 37 L.Ed. 2d 419 (1973) and its companion cases had not been decided at that time. The Georgia obscenity statute 26-2101 had been upheld in Gable v. Jenkins 309 F. Supp. 998, aff'd. 397 U.S. 592 (1969). The Georgia courts had not construed nor applied the recently enacted code section, Georgia Code Annotated 26-2103. There was no way of knowing if the General Nuisance statutes dealing with houses of prostitution (72-301 et al) could be applied to bookstores so as to work a forfeiture. There was still pending a criminal case brought against the former owner of the store which had been tried once but which resulted in a hung jury. And, most important, there was an ongoing state proceeding in which the appellants herein could raise all issues. Additionally, the state trial court had not acted yet. The case was "snatched right off the trial judges bench" so that all the Federal Court, in the way of State action had before it was a complaint asking for relief. Without construing Georgia statutes the federal court could not determine what relief the state court would or could grant the appellants' herein nor determine how the statutes would be applied by the State judiciary.

Even though 42 U.S.C. 1983 is an exception to the anti-injunction statute 28 U.S.C. 2283 Mitchum v. Foster, 407 U.S. 225 (1972); the District Court must still consider issues of abstention, comity and "general notions of equity or federalism, similar to those invoked in *Younger*." Concurring opinion of Mr. Chief Justice Burger, Mr. Justice White and Mr. Justice Blackmun. Mitchum v. Foster 407 U.S. 225 (1972). The admitted power of a federal court under the Civil Rights Acts to enjoin state proceedings is not to be used to upset federalism and centralize power. Fisher v. Federal National Mortgage Association 360 F. Supp. 207 (D.C. Md.) (1973). *See also* Lynch v. Snepp 472 F.2d 769 (4th Cir. 1973).

ABSTENTION

Abstention is an issue in this case, but the classical *Pullman*[1] situation is not present. *Zweckler v. Koota* 389 U.S. 241 (1967).

The doctrine of abstention admonishes that a District Court should postpone resolution of a challenge to the constitutionality of a state statute until there has been a definite construction of that statute by the State Court. Railroad Commission of Texas v. Pullman Co. 312 U.S. 496 (1941). The *Pullman* doctrine is simply a judicial doctrine that recognizes our concept of federalism and the desirability that state courts have the first chance at interpreting new state law. (Fornaris v. Ridge Tool, 400 U.S. 41 (1970)). Reetz v. Bozonich, 397 U.S. 82 (1970). For, the state statute may be susceptible to "a construction that would avoid or modify the Federal question. Lake Carrier's Association v. MacMillan 406 U.S. 498 (1972). For a federal court to

[1] Railroad Comm'n of Texas v. Pullman Co. 312 U.S. 496 (1941).

prematurely interpose its own declaration as to the State law would not aid the local courts in their duty, nor hasten its performance. Major v. Ferdon 325 F. Supp. 1141 (N.D. Cal. 1971). Therefore, the constitutionality of a state statute is a question for state courts initially. Porter v. Kimzey 309 F. Supp. 993, aff'd. 91 S.Ct. 1237. In deciding whether to abstain a federal court must balance the possibility that the construction rendered by the State would *avoid* or *modify* the constitutional question against the loss of time and its damage to the rights of the person attacking a state statute. A District Court cannot authoritatively construe a state statute, but a state court can. Harrison v. NAACP 360 U.S. 167 (1957). And, in the First Amendment area a State Court can authoritatively construe a statute to avoid constitutional issues. Miller v. California — U.S. — 37 L.Ed. 2d 419 (1973) and companion cases. However, in the instant case, the time element of abstention and respect for plaintiff's choice of forum do not apply, Zweckler v. Koota 389 U.S. 241 (1967) because there was an ongoing State proceeding where appellant admitted, he could raise his challenge and appellant sought federal intervention *after* the choice of forum had been made.

In the case of O'Neil v. Battisti 472 F.2d 789 (6th Cir. 1972), the court faced with a situation similar to the case at bar held that the district court should have abstained, the issue having its roots in the judicial system of the State of Ohio, and the state should be the first to resolve such issue *especially* where there is an *ongoing state proceeding*. In *O'Neil*, the Supreme Court of Ohio had begun disciplinary proceedings against an attorney and had issued its order. The District Court was petitioned to enjoin the enforcement of the

Supreme Court's order. Likewise where Federal and State questions are meshed, abstention would be proper even where there is no ongoing state case. Romero v. Caldwell 455 F.2d 1163 (5th Cir. 1972). In other cases the courts have abstained where there are no pending state actions. In Lake Carrier's Association v. MacMillan 406 U.S. 498, an action was brought in federal court attacking the Michigan Water Pollution Act of 1970 as unconstitutional. No state civil or criminal action was pending, but the statute had never been construed by Michigan courts. The court held that when the state statute is susceptible to a construction by the State Courts that would modify or avoid the federal question abstention was proper. In *Lake Carriers* the State and Federal Act was in conflict, but a recently issued list of federal clean water standards had been published and the court said that the state court should have the right under our dual judicial system to construe the state act in light of the new federal standards.

In the instant case, the Georgia Courts have never construed Georgia Code Annotated 26-2103. Appellant is in error when he cites 1040 Peachtree Corp. v. Slaton 228 Ga. 102, 184 S.E. 2d 144 (1972). In that case a single film—(*Sandra*) was attacked as obscene in an adversary hearing procedure filed preparatory to a seizure for a criminal action. The abating of the *premises* was *not* involved. The action was identical to that in *Paris Art v. Slaton* — U.S. — 37 L.Ed. 2d 446 (1973). *1040 Peachtree* was Palaio v. McAuliffe, 466 F.2d 1230 (5th Cir. 1971) when it appeared in Federal Court. Walters v. Slaton 227 Ga. 676, 182 S.E. 2d 464 (1971) was likewise an adversary hearing procedure attacking one film.

No state case except the recent case of *Sanders v. Georgia supra* now awaiting decision has dealt with the abatement of a building for selling obscene materials. Many constructions of the statute are possible and probable when construed in light of prior Georgia law. For example, the only forfeiture nuisance statute refers to " . . . place used for purpose of lewdness, assignation or prostitution." Georgia Code Annotated 72-301. Under Georgia law forfeiture and padlocking can only occur where a statute expressly authorizes it. Davis v. State 199 Georgia 839, 35 SE 2d 458 (1945). Is a bookstore a place used for the purpose of lewdness, assignation or prostitution? A State Court answer in negative would modify the federal question considerably. Since this case arose, the Supreme Court of Georgia has held in an order dated October 1, 1973, in Slaton v. S.S.W. Corp. Georgia Supreme Court Case #28400 cited in Sanders v. McAuliffe N.D. Georgia #18,913, that a temporary injunction against a single movie must be made permanent within 60 days. A holding which, in all probability, would extend to actions brought under Georgia Code Annotated 26-2103.

The Georgia Courts could hold under the wording of the statute that a prior criminal conviction involving the material must be obtained before the state could base an abatement action on the sale of such materials. One sale may not be enough, multiple sales may be required and multiple convictions. In fact, the isolated transaction question is now before the Georgia Supreme Court in the *Sanders* case referred to above. Therefore, state action conceivable could modify the federal question or confine the statute to a narrow ambit which would avoid the constitutional question and by ab-

staining the Federal Court avoided any possible irritant in the federal-state relationship. Reetz v. Bozanich 397 U.S. 82, 86-87 (1967). Other State's Courts have construed similar statutes' to avoid constitutional questions. New Rivieria Arts Theatre v. Tennessee 219, Tennessee 652, 412 S.W. 2d 890; Mitchem v. Florida, 250 So 2d 883 (1971). In light of the foregoing, the District Court properly concluded that some "Special circumstances" would have to be present in order to justify intervention.

COMITY

The District Court was correct in holding that in this case for federal intervention, special circumstances must be pleaded and proven and that these special circumstances are to be measured by *Younger* bad faith harassment.

The doctrine of Comity grows out of respect for our constitutionally created dual system of justice, Younger v. Harris 401 U.S. 37 (1971). It rests on a proper respect for state functions and recognition that the national government will fair best if the states and their institutions are left free to perform their separate functions in their separate ways. Fisher v. Federal National Mortgage Association 360 F. Supp. 207 (D.C. Md. 1973). Ordinarily the jurisdiction of a state court first obtained should not be interfered with by federal courts. *Fisher Supra;* Duke v. Texas 477 F.2d 244 (5th Cir. 1973). And, as a general rule any doubt concerning the propriety of an injunction against state proceedings should be resolved against the granting of an injunction. Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers 398 U.S. 281 (1970).

There must be some special circumstances to justify federal intrusion into a state court action; either criminal Younger v. Harris 401 U.S. 37 (1971); civil; Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970); Cousins v. Wigoda 463 F.2d 603 (7th Cir. 1972) or quasi-criminal Roy v. Jones 349 F. Supp. 315 (W.D. Pa. 1972); Geiger v. Jenkins 316 F. Supp. 370 (N.D. Ga. 1970) aff'd. 91 S.Ct. 1236. In the case of Cousins v. Wigoda 463 F.2d 603 (7th Cir. 1972) stay denied 92 S.Ct. 2610 (1972), plaintiffs brought an action challenging delegates to the national party convention. There was a state civil action pending at the time the federal complaint was filed. The District Court abstained holding that simply a chilling effect on First Amendment Rights did not justify federal intervention where irrevocable injury had not been established. The Court said:

> "Thus assuming without deciding that the state complaint contains a frivolous and overly broad prayer for relief which if granted *in haec verba*, would impair the First Amendment rights . . . we hold that the mere existence of such a possibility does not justify a federal court's entry of an order effectively excising that prayer from the State complaint. The partial stay of the state court proceeding cannot be supported by mere speculation that an Illinois chancelor might commit flagrant error. The principals of comity and federalism which the Supreme Court has repeatedly emphasized demand a higher respect for the state judiciary. ". . . (E)xcessive prayers . . . is not the kind of conduct described as bad faith or harassment." Cousins v. Wigoda 463 F.2d 603, 608 (7th Cir. 1972).

The District Court, furthermore, cannot base its jurisdiction upon anticipated erroneous action by the

state court, Wells v. Hand 238 Fed. Supp. 779 (M.D. Ga. 1965).

In the instant case appellant cites the mere pendence of a claim as chilling First Amendment rights, however, as shown above, this in itself is not enough to justify federal intervention.

And, furthermore he simply bases his claim of irreparable injury on some hypothetical action by Georgia Courts. But, the true test in determining intervention is the pendency of state proceedings and whether the moving party will suffer irreparable injury that cannot be eliminated by his defense of the single state civil action. Lynch v. Snepp 472 F.2d 769 (4th Cir. 1973) app. pending.

It cannot be overemphasized that it is admitted in the case at bar, that appellant could raise all constitutional issues in the pending state court proceeding.

Even though *Younger* makes a distinction between civil and criminal cases, 28 U.S.C. 2283 does not.

The application of general notion of comity, equity and federalism to determine whether federal courts should enjoin state officers should not turn on labels such as "civil" or "criminal" but rather upon analysis of the competing interests. Lynch v. Snepp 472 F.2d 767 (4th Cir. 1973) app. pending.

The courts have applied *Younger* standards in Civil cases Lynch v. Snepp 472 F. 2d 769 (1973); Cousins v. Wigoda 463 F.2d 603 (4th Cir. 1972). Fisher v. Federal National Mortgage Association 360 F. Supp. 207 (D.C. Md. 1973).

In *Lynch supra* plaintiffs' filed a suit in federal district court to enjoin two orders issued by a state court

prohibiting anyone other than students, employees, teachers, parents transporting children and those with permission from school authorities from entering upon certain school premises. The court held that intervention would be improper where there was no allegation or showing that whatever overbreath existed in the state courts orders could not be cured by immediate appeal to the state appellate courts. The court said:

> ". . . notions of comity, equity, and federalism applied since the early days of our Union . . . occupy a highly important place in our history and our future, their application should never be made to turn on such labels as "civil" or "criminal" but rather upon an analysis of the competing interests in each case. Lynch v. Snepp 472 F.2d 769 (4th Cir. 1973).

In *Fisher supra*, homeowners sued to enjoin a pending state foreclosure proceeding. The Court held in dismissing the suit that the homeowners could challenge the legality of the action in the state forum and the homeowners had not alleged any bad faith harassment.

The court said (citing Lynch v. Snepp 472 F.2d 767) that

> "The *Younger-Lynch* rationale is based on the notion of comity which is posited on a proper respect for state functions and a recognition that the national government will fair best if the states' and their institutions are left free to perform their separate functions in their separate ways. . . . The admitted power of a federal court under the Civil Rights Act to enjoin state proceedings is not to be used to upset federalism and centralize power. The "pendency" of state proceedings is one of the most important criteria in determining whether federal court intervention in state action is ap-

> propriate. Fisher v. Federal National Mortgage Association 360 F. Supp. 207 (D.C. Md. 1973).

However, where the pending state action is quasi-criminal, that is where a civil action is an integral part of the enforcement of a state's police power, the use of *Younger* standards becomes even more persuasive *Duke v. Texas* 477 F.2d 244 (5th Cir. 1973). In the instant case the District Court construed the nuisance action as "an integral part of the state's enforcement of its criminal law." In Kingsley Books v. Brown 354 U.S. 436 (1957) this court said:

> whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination is a matter within the legislature's range of choice. 354 U.S. 436; 441 (1957).

Here, the state proceeded criminally and then civily. The civil action was being used to enforce the General obscenity statute (Ga. Code Ann. 26-2101) by attempting to remove the place where the alleged criminal activity was being and is still being committed. Palaio v. McAuliffe 466 F.2d 1230 (5th Cir. 1971). Duke v. Texas 477 F.2d 250 (5th Cir. 1973). General Corporation v. Baxley United States District Court, Northern District of Alabama, civil action 73-194-NE decided Oct. 18, 1973.

The concept of civil cases being criminal in nature so as to fall within the *Younger* requirements is not new. In Geiger v. Jenkins, 316 F. Supp. 370 (N.D. Ga. 1970) aff'd 91 S.Ct. 1236, it was held that a disciplinary action against a doctor was in the nature of a criminal proceeding and the district court refused to intervene citing 28 U.S.C. 2283. In *Geiger* the plaintiff was chal-

lenging a "state statute regulating activities in which the state has a vital interest." Geiger v. Jenkins; 316 F. Supp. 370, 373 (N.D. Ga. 1970); aff'd 91 S.Ct. 1236.

In the case of Roy v. Jones 349 F. Supp. 315 (W.D. Pa. 1972), the plaintiffs were justice's of the peace who had been suspended by a state supreme court order without hearing and notice. The suspended justice's brought a civil rights action to enjoin the state courts suspension order in federal court. The District Court held that intervention was improper where the state proceedings were brought in good faith, no violations of constitutional rights were shown and no likelihood of irreparable injury appeared.

The court said:

> "We think the test of irreparable injury used in deciding whether to intervene in state criminal proceedings is the appropriate criteria to use in deciding whether intervention is appropriate in this case. State disciplinary proceedings are similar in many ways to state criminal proceedings. Roy v. Jones 349 F. Supp. 315, 325 (W.D. Pa. 1972).

Three cases have applied *Younger* standards in refusing to intervene in an ongoing state nuisance proceedings.

In Palaio v. McAuliffe 466, F.2d 1230 (1971), the state brought an adversary hearing procedure against a single film. There was no statutory procedure so the state tracked common law nuisance and prayed that the film be subject to seizure after a temporary hearing. The District Court refused to enjoin holding that the principals of *Younger* should not depend upon such labels as "civil" or "criminal," but rather upon an analysis of the competing interests that each case

presents. And, when federal anticipatory relief will significantly affect a state's enforcement—by whatever means—or its criminal laws, then such relief is barred by the strong policy of noninterference, unless the plaintiff can meet the heavy burden of proof that *Younger* imposes.

In Duke v. Texas, 477 F.2d 244 (5th Cir. 1973) the District Court issued an injunction restraining the enforcement of an existing state court injunctive order which forbade plaintiff's below from speaking at North Texas State University. The court of appeals reversed and held that *Younger* principles of equity, comity, and federalism apply to federal intervention in state "civil" as well as criminal proceedings even where the exercise of First Amendment rights is involved *especially* where the civil action is an express additional sanction to a criminal statute. In *Duke* the criminal statute which plaintiffs in district court were alleged to have violated contained the added remedy of injunction. The chapter of the Georgia Code dealing with obscenity Georgia Code Annotated 26-2101 *et al* also allows for injunction as an additional sanction to the criminal case. Even though denominated civil, the State of Georgia is here, like the State of Texas in the *Duke* case simply asking for a remedy which the legislature of Georgia has provided as part of a comprehensive scheme for enforcement of its Penal Code. Finally in the case of General Corporation v. Baxley, United States District Court, Northern District of Alabama, Civil Action No. 73-194-NE decided Oct. 18 1973, the court held that intervention in a state proceeding to abate several theatres and bookstores as nuisances was improper absent bad faith harassment and irreparable injury. The court pointed out that the state pro-

ceedings to abate a nuisance complaint serve as a substitute for the criminal laws of the state, therefore, *Younger* applied. The Alabama statute was similar to the Georgia House of Prostitution statute, Ga. Code Ann. 72-302. The district court pointed out that, as in instant case, the plaintiffs failed to demonstrate bad faith or harassment or that irreparable injury would result if consigned to the state court remedies. The court also pointed out, as in the case here, that the state courts of Alabama could construe the statute in question to exclude bookstores and theatres thereby avoiding the federal question.

The cost of the duplication of effort in both time and money where a federal court intervenes in an ongoing state proceeding either civil or criminal implies that state courts are either incapable or unwilling to vindicate federal constitutional rights. However, it cannot be forgotten that the constitution calls upon state judges by name and puts upon them the obligation to apply the Supreme Law of the land. To presume that State judges will not do so absent proof would be to destroy our concept of federalism.

CONCLUSION

Therefore, the District Court was correct in holding that in this case the *Younger* requirements were applicable and that in addition abstention was proper. Appellee prays that the decision of the District Court be affirmed.

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon opposing counsel the within and foregoing Appellee's Brief by mailing two (2) copies thereof, postage prepaid, to:

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This _____ day of December, 1973.

THOMAS R. MORAN

SPEIGHT, T/A HAREM BOOK STORE, ET AL. *v.* SLATON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 72-1557. Argued January 7-8, 1974—Decided February 27, 1974

Following oral argument in this Court of this appeal from an order of a three-judge District Court declining, on the basis of *Younger* v. *Harris*, 401 U. S. 37, to intervene in a state proceeding to enjoin operation of appellants' bookstore on the ground that it was violating a "public nuisance" statute by selling obscene materials, the statute was held unconstitutional by the Georgia Supreme Court as applied in a similar case, *Sanders* v. *State*, 231 Ga. 608, 203 S. E. 2d 153. Since appellants may secure a dismissal of the state proceeding against them on the basis of *Sanders*, thus precluding any irreparable injury, without which federal injunctive relief would be barred, the judgment below should be reconsidered in the light of the *Sanders* decision.

356 F. Supp. 1101, vacated and remanded.

Robert Eugene Smith argued the cause for appellants. With him on the brief was *D. Freeman Hutton*.

Thomas R. Moran argued the cause and filed a brief for appellees.

PER CURIAM.

This is an appeal from a decision of a three-judge district court (356 F. Supp. 1101) declining to intervene in a pending state civil proceeding and holding that such intervention was barred by our decision in *Younger* v. *Harris*, 401 U. S. 37. The state proceeding, brought against appellants by the Solicitor General of Fulton County, Georgia, sought an injunction against the operation of appellant Speight's bookstore, and confiscation and destruction of all merchandise on the store's premises, on the grounds that the store was being used for the

"advertising, storage, sale, and exhibition for sale of materials obscene within the meaning of Section 26–2101 of the Criminal Code of Georgia." The basis for the State's action was § 26–2103 of the Code under which the use of any premises for the violation of § 26–2101 constitutes a "public nuisance," thereby triggering the application of state statutory provisions for the abatement of public nuisances, c. 72–2 of the Code of Georgia. The case is here on appeal. 28 U. S. C. §§ 1253, 2101 (b). We noted probable jurisdiction to decide whether under these circumstances federal intervention in the pending state proceedings was barred by our holding in *Younger* v. *Harris, supra.*

Since oral argument of this case the Georgia Supreme Court has struck down the application of § 26–2103 in another case involving similar facts. *Sanders* v. *State,* 231 Ga. 608, 203 S. E. 2d 153 (1974). In *Sanders* the State had brought an action to enjoin the operation of a bookstore on the ground that certain publications sold by the store were obscene under § 26–2101. The supreme court held that this application of § 26–2103 "represents an unconstitutional prior restraint when construed and applied to authorize the permanent closure of the book store as a public nuisance upon a finding that a single publication, obscene under the standards of Code Ann. § 26–2101 (b) was sold on its premises." *Id.,* at 611, 203 S. E. 2d, at 155. As we understand the Georgia court's decision, the operation of a bookstore could not be enjoined merely because some of its merchandise had been judicially determined to be obscene. The Georgia court cited both the Federal and Georgia Constitutions in its decision, although it was not explicit as to whether each provided, in its view, an independent ground for its holding.

It would appear that this Georgia Supreme Court decision would probably foreclose the state action

against which federal injunctive relief was sought by appellants in this case. In that event appellants could obtain full relief in the state court proceeding merely by moving to dismiss the state action, in accord with state procedural rules, in light of *Sanders* v. *State*. If that is the case, appellants could not now make any showing of irreparable injury by reason of the state court proceeding, and such a showing is of course required before the federal court could grant the equitable relief, apart from any special considerations involved in *Younger* v. *Harris*, 401 U. S. 37, 46.

We therefore vacate the judgment below and remand to the District Court for reconsideration in light of the decision of the Georgia Supreme Court in *Sanders* v. *State*, *supra*.

It is so ordered.